

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

R.P., Appellant)	
)	
and)	Docket No. 15-1335
)	Issued: October 6, 2016
U.S. POSTAL SERVICE, NORTH RICHLAND)	
HILLS POST OFFICE, North Richland Hills, TX,)	
Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Debra Hauser, Esq., for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 7, 2014 appellant, through counsel, filed a timely appeal of a November 20, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly rescinded acceptance of a recurrence of disability of May 13, 2013 causally related to appellant's June 24, 1998 employment injury.

On appeal, counsel argues that OWCP failed to meet its burden and to follow its procedures when rescinding acceptance of the recurrence claim.

FACTUAL HISTORY

On January 7, 1999 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on June 24, 1998 he first became aware of his bilateral thumb condition. However, it was not until November 18, 1998 that he realized his condition was employment related. OWCP accepted the claim for temporary aggravation of bilateral thumb arthritis.³ Appellant worked light-duty positions until being placed on the periodic rolls for temporary total disability effective October 21, 2010. On March 27, 2013 he returned to work in a limited-duty carrier position, but stopped work again on March 29, 2013.

Appellant returned to work again on April 20, 2013 at the employing establishment. A rehabilitation counselor was assigned to appellant to ensure a successful return to work. It was determined that there was no full-time modified work for him at this station.

On May 10, 2013 the employing establishment offered appellant the position of modified city carrier at the Seminary Hill Station. Work hours were 8:30 a.m. to 5:00 p.m. with rotating scheduled days off. The duties of the position included 5.50 hours of delivering mail and 2.50 hours of lobby assistance. Physical restrictions included 1 to 5.33 hours per day of simple grasping/fine manipulation, 1 to 8 hours of standing and walking, 1 to 2 hours of lifting up to 10 pounds and 1 to 4 hours of pulling/pushing. On May 13, 2013 appellant refused the offered position because he believed the park and loop delivery of mail required lifting of more than 10 pounds.

By letter of May 22, 2013, appellant was advised that the position was determined to be suitable work and that he had 30 days to either accept the position or provide written explanation as to why he refused it. In response, he submitted a May 22, 2013 duty status report from Dr. Deepak V. Chavda, a treating orthopedic surgeon. In a May 22, 2013 report, Dr. Chavda diagnosed bilateral hand and wrist osteoarthritis, bilateral carpal tunnel syndrome more on the left than the right, bilateral de Quervain's syndrome, and left side thenar atrophy. A physical examination of the left and right hands and wrists "shows well-healed scar over the carpometacarpal joint area extending towards the wrist area," thenar atrophy, normal wrist and digits range of motion, and positive Finkelstein's, Tinel's, and Phalen's tests. The right hand and wrist physical also reflected grip and pinch weakness. Dr. Chavda's review of x-ray interpretations of both hands showed major carpometacarpal (CMC) joint arthropathy and mild interphalangeal and metacarpophalangeal joint arthropathy. He provided recommendations

³ By decision dated October 26, 2007, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity.

which included bilateral wrist splints, a magnetic resonance imaging (MRI) scan of both hands and wrists, and limited or no use of both hands at work.

On May 28, 2013 OWCP received a May 21, 2013 duty status report from Dr. Chavda. Dr. Chavda indicated that appellant had limited use of both his thumbs and that appellant was off work pending hand and wrist MRI scans.

In June 5 and 13, 2013 reports, Dr. Chavda reviewed MRI scans of the hands and wrists. He found appellant capable of working with limited use of both hands. Based on a review of the MRI scan, he diagnosed bilateral wrist and hand osteoarthritis, clinical bilateral carpal tunnel syndrome, bilateral de Quervain's syndrome, left side thenar atrophy, severe left first carpometacarpal osteoarthritis, left intercarpal joint effusion, left subchondral cyst in the lateral lunate and distal scaphoid, right subchondral edema in the lateral lunate, and right separated bone fragment seen anteromedially.

In a June 5 and 13, 2013 duty status reports, Dr. Chavda indicated that appellant was disabled from working, but noted work restrictions of no driving a motor vehicle at work and limited to no use of both his wrists/hands.

In a duty status report and reports dated June 27 and July 18 2013 from OWCP Dr. Chavda reiterated prior findings and diagnoses. He again reported that appellant was capable of working light duty with limited use of both hands. OWCP also received duty status reports dated June 28 and July 17, 2013 from Dr. Chavda restricting appellant's use of his hands and no driving a motor vehicle.

On August 22, 2013 OWCP terminated appellant's wage-loss compensation benefits effective August 16, 2013 after he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

On September 5, 2013 appellant filed a claim for a recurrence of disability beginning May 13, 2013 causally related to his accepted June 24, 1998 employment injury. He stated that he was unable to use his hands which the job required and that his condition had worsened. Appellant related that he had significant pain after being required to use his hand continuously upon returning to work.

Subsequent to appellant filing his recurrence claim OWCP received additional medical evidence. OWCP received reports dated July 18 and August 29, 2013 which reiterated physical findings and diagnoses from Dr. Chavda's prior reports. Dr. Chavda reiterated work restrictions of limited use of appellant's hands and wrists.

By decision dated September 30, 2013, OWCP accepted appellant's claim for a recurrence of disability based on a May 22, 2013 report from Dr. Chavda.⁴

⁴ On September 24, 2013 OWCP recommended converting appellant's September 5, 2013 claim for a recurrence of disability into a new occupational disease claim with a date of injury of May 13, 2013 as a new injury was clearly indicated based on the exposure to new work factors. It recommended that, following the creation of the new claim, that both claims should be doubled. The new claim was assigned OWCP File No. xxxxxx797.

On October 28, 2013 OWCP received a May 29, 2013 initial evaluation report which was signed by Dr. Chavda, Dr. Daniel L. Brown, a chiropractor, and Mark Dodson, a physical therapist. The report noted that in 1998 appellant first became aware of his bilateral wrist injury due to his repetitive work. Physical examination revealed decreased strength and range of motion for both wrists, bilateral pain on Finkelstein's, Tinel's, and Phalen's tests. A three-week active rehabilitation exercise program was recommended.

On October 11, 2013 Dr. Chavda diagnosed bilateral wrist and hand osteoarthritis, bilateral de Quervain's syndrome, left side thenar atrophy, and bilateral carpal tunnel syndrome. He noted that appellant's recurrence claim had been accepted and that appellant remained off work pending electromyograph studies. In an attached CA-17 form, Dr. Chavda indicated that appellant remained totally disabled from working and requested expansion of his claim to include bilateral carpal tunnel syndrome.

By decision dated November 20, 2013, OWCP rescinded its acceptance of the recurrence of disability dated September 30, 2013 as OWCP determined that the case should have properly been adjudicated as a new injury claim due to the new work factors. Thus, it converted appellant's claim for a recurrence into a new occupational disease claim under OWCP File No. xxxxxx797.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁶ 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.⁷

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud.⁸ It is well established that, once OWCP accepts a claim, it has the burden to justify the termination or modification of compensation benefits. This holds true where OWCP later decides that it erroneously accepted a claim. To establish that its prior acceptance of the recurrence was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.⁹

⁵ 5 U.S.C. § 8128.

⁶ *L.C.*, 58 ECAB 493 (2007); *D.G.*, 59 ECAB 74 (2008); *John W. Graves*, 52 ECAB 160 (2000).

⁷ 20 C.F.R. § 10.610.

⁸ *V.C.*, 59 ECAB 137 (2007).

⁹ *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *H.G.*, 59 ECAB 552 (2008); *John W. Graves*, *supra* note 6.

ANALYSIS

In a September 30, 2013 decision, OWCP accepted appellant's claim for recurrence effective May 13, 2013. On October 9, 2013 it issued a proposal to rescind acceptance of the recurrence as it determined that his claim for recurrence should have been handled as a new occupational disease claim. By decision dated November 20, 2013, an OWCP hearing representative issued a final decision to rescind acceptance of the recurrence of disability and converted the May 13, 2013 claim to an occupational disease claim to be adjudicated under OWCP File No. xxxxxx797.

The Board has recognized OWCP's authority to reopen a claim at any time on its own motion. In rescinding a prior acceptance, the Board must provide a clear explanation of the rationale for the decision.¹⁰ The Board finds that OWCP provided a clear rationale for rescinding its prior acceptance of a recurrence of disability. The Board determined that appellant's claim was more appropriately handled as a new claim due to his exposure to new employment factors after he returned to work.

Appellant attributed his inability to work due to a worsening of his conditions as a result of being required to use his hand continuously upon returning to work. A recurrence is defined as 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.¹¹ It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹² The Board finds that the claimed disability was more appropriately considered as an intervening injury and new exposure to work factors which negated the causal relationship between the accepted conditions and his condition as of May 13, 2013. The Board finds, therefore, that OWCP provided a clear explanation for its rescission.¹³

In 1999, OWCP had accepted appellant's occupational disease claim for temporary aggravation of bilateral thumb arthritis. The contemporaneous medical evidence includes reports from Dr. Chavda diagnosing bilateral hand and wrist osteoarthritis, bilateral carpal tunnel syndrome more on the left than the right, bilateral de Quervain's syndrome, and left side thenar atrophy. He provided work restrictions of limited use of appellant's hands and wrists. These were all new injuries and Dr. Chavda did not discuss appellant's accepted condition. The Board finds that OWCP has met its burden of proof to rescind acceptance of the recurrence.

¹⁰ *Supra* note 9.

¹¹ 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

¹² OWCP procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2(b) (June 2013). *Kenneth R. Love*, 50 ECAB 193 (1998).

¹³ *See Bryant F. Blackmon*, 56 ECAB 752 (2005).

On appeal counsel argues that OWCP failed to meet its burden to rescind acceptance of appellant's claim for a recurrence of disability. In support of this argument he argued that OWCP based the rescission on a weighing of evidence already in the record to arrive at a different conclusion. Counsel cites to *D.M.*, Docket No. 11-2052 (issued March 14, 2012); *A.C.*, Docket No. 07-0224 (issued July 23, 2007); *G.L.*, Docket No. 08-2533 (issued May 11, 2009); and *George E. Reilly*, 44 ECAB 458 (1993). However, as discussed above, OWCP based its decision on the fact that it should properly have been handled as a new injury claim, as appellant had returned to work in March and April 2013. None of the cases cited by counsel are in accord with the facts of this case nor do they disagree with the holding of the Board in this case. In *A.C.* and *G.L.*, the Board found that OWCP had properly rescinded acceptance of appellant's claim and, in *D.M.*, although the Board found OWCP had not properly rescinded the acceptance of the claim, there had been no intervening work factors. In *George E. Reilly*,¹⁴ the Board found that OWCP had improperly rescinded acceptance of appellant's claim because it had not provided new evidence. OWCP has since changed its regulations, and the Board has affirmed, that OWCP need not submit new evidence to meet its burden of proof to rescind.¹⁵

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 to rescind acceptance of a recurrence of disability of May 13, 2013.

¹⁴ 44 ECAB 458 (1993).

¹⁵ See *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 20, 2013 is affirmed.

Issued: October 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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