

FACTUAL HISTORY

On June 13, 1989 appellant, then a 28-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on May 24, 1989 she injured her right knee when she slipped on a wet floor. OWCP accepted the claim, assigned file number xxxxxx464, for a right knee and leg sprain, an old disruption of the right anterior cruciate ligament, a right knee contusion and tear of the medial meniscus, and post-traumatic right knee arthritis. Appellant stopped work on May 24, 1989 and resigned from her firefighter position on July 5, 1989. She underwent a partial medial meniscectomy of the right knee on January 11, 1990, a reconstruction of the anterior cruciate ligament with dual internal screw fixation on November 1, 1990, and a partial medial meniscectomy with removal of the fixation screws on October 21, 1992.³

Appellant returned to work in another position at the employing establishment beginning July 7, 1997. OWCP paid her compensation based on a loss of wage-earning capacity determination.⁴ On January 29, 2003 appellant underwent reconstruction of the anterior cruciate ligament.

OWCP accepted that on October 4, 2003 appellant, while employed as a recreation assistant, sustained a right knee strain under file number xxxxxx432. Appellant resigned from her position effective July 17, 2004. OWCP combined the case under master file number xxxxxx464.

On April 7, 2013 appellant underwent an authorized right knee arthroplasty. In a compensation termination sheet dated May 15, 2013, OWCP found that she sustained a recurrence of disability beginning April 7, 2013 and paid her compensation for total disability beginning that date. It indicated that it had set aside the loss of wage-earning capacity determination.

By letter dated May 17, 2013, OWCP advised appellant that she was entitled to compensation for total disability beginning April 7, 2013 due to her authorized right total knee replacement. It requested that she submit information regarding her pay rate.⁵ On May 22, 2013 OWCP informed appellant that it had placed her on the periodic rolls.

In a September 3, 2013 report, Dr. Michael W. Eaton, an attending Board-certified orthopedic surgeon, diagnosed status post arthroplasty of the right knee due to post-traumatic arthritis and opined that appellant could work four hours per day without extensive standing or walking. He further advised that she could work full time in positions that did not require walking or standing. In a work restriction evaluation dated September 3, 2013, Dr. Eaton related that appellant had permanent restrictions on walking for four hours per day and standing for one hour per day. He additionally determined that she could not push, pull, lift, squat, kneel, bend, twist, or climb.

³ OWCP granted appellant a schedule award for 14 percent permanent impairment of the right lower extremity on November 26, 1991.

⁴ A November 4, 1997 hearing representative's decision found that appellant received a \$23,701.80 overpayment because OWCP paid her based on an inaccurate pay rate from July 30, 1991 through November 9, 1996.

⁵ In an August 6, 2013 decision, OWCP found that appellant was not entitled to a recurrent pay rate.

In a September 17, 2013 Form CA-1032, appellant indicated that she worked as a sales clerk beginning January 2011 for the employing establishment.

Dr. Eaton, in a report dated June 27, 2014, opined that appellant had reached maximum medical improvement after her total knee replacement. He related that on February 17, 2014 she had requested “a release to return to work with no restrictions, which my office provided.”

Appellant submitted October and November 2014 CA-1032 forms indicating that she worked as a cashier for the employing establishment during the previous 15-month period.

On November 19, 2014 OWCP advised appellant that it had terminated her compensation payments as CA-1032 forms indicated that she had worked since January 2011 earning \$1,300.00 per month. It requested that she provide pay stubs as of the date she returned to work so that it could calculate her entitlement to compensation and the amount of any overpayment.

Appellant, on February 26, 2015, submitted pay stubs showing that she received checks in varying amounts for private employment from March 3 to October 24, 2014.

On May 18, 2015 counsel advised that it appeared that appellant had resumed work on November 16, 2014 and requested that she receive compensation based on her loss of wage-earning capacity.

By letter dated May 27, 2015, OWCP requested that appellant submit pay stubs after October 19, 2014. It noted that the medical evidence established that she was released to her usual employment on February 17, 2014. OWCP noted that appellant was only entitled to compensation for a loss of wage-earning capacity if the medical evidence showed that she had residuals of her work injury that prevented her from performing her date-of-injury position.

In a September 8, 2015 decision, OWCP determined that appellant did not demonstrate that she had a continuing loss of wage-earning capacity as the evidence established that she was capable of performing her usual work duties beginning February 17, 2014.

Appellant, through counsel, on September 16, 2015 requested a telephone hearing. At the telephone hearing, held on May 24, 2016, the hearing representative noted that OWCP paid her compensation based on a December 2, 1997 loss of wage-earning capacity determination until April 6, 2013 and compensation for total disability until November 15, 2014. Appellant asserted that Dr. Eaton did not release her to resume her usual work as a firefighter, but instead to the job that she was performing as a clerk immediately before her April 2013 surgery. She advised that she was currently working in a fast food position. Appellant related that Dr. Eaton was recently deceased and that she had to find a new physician.

By decision dated July 5, 2016, an OWCP hearing representative affirmed the September 8, 2015 decision. He found that OWCP terminated compensation as Dr. Eaton released appellant to perform her usual employment. The hearing representative determined that appellant had not submitted evidence demonstrating that she had any work-related disability beginning February 17, 2014, and denied entitlement to compensation as of that date.

In a report dated August 3, 2016, Dr. John T. Duddy, an orthopedic surgeon, related that Dr. Eaton released appellant to return to full duty after an April 2013 total knee arthroplasty. He

noted that, based on Dr. Eaton's report, workers' compensation found that she could work as a firefighter, a position not held since 1989. Dr. Duddy diagnosed status post total knee arthroplasty with continued pain with some synovial fluid, which he aspirated. He found that appellant could perform medium work that "would preclude her previous work of 26 years ago as a firefighter." In an August 8, 2016 work status form, Dr. Duddy opined that she could perform medium work lifting a maximum of 50 pounds and frequently lifting up to 30 pounds, but could not work as a firefighter.

Appellant, through counsel, on August 19, 2016 requested reconsideration.

By decision dated September 12, 2016, OWCP denied modification of its July 5, 2016 decision. It found that Dr. Duddy did not sufficiently explain his finding why appellant was not able to work as a firefighter.

On appeal counsel argues that OWCP did not consider the seriousness of appellant's condition and the work requirements of a firefighter and failed to properly consider the medical evidence.

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 application.⁶ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁷ The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.⁸

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.⁹ This holds true where OWCP later decides that it erroneously accepted a claim.¹⁰ Having determined that an employee has a disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to employment. It is required to provide a clear explanation of the rationale for rescission.¹¹

OWCP procedures provide:

"A rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why [OWCP]

⁶ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁷ *John W. Graves*, 52 ECAB 160 (2000).

⁸ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁹ *See Linda L. Newbrough*, 52 ECAB 323 (2001).

¹⁰ *Id.*

¹¹ *See Andrew Wolfgang-Masters*, 56 ECAB 411 (2006); *see also* 20 C.F.R. § 10.610.

finds that the decision should be rescinded. The evidence used to rescind the claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated, and why the original decision is now being invalidated.”¹²

ANALYSIS

OWCP accepted that appellant sustained a sprain of the right knee and leg, a disruption of the right anterior cruciate ligament, a right knee contusion, a tear of the right medial meniscus, and post-traumatic arthritis of the right knee due to a May 24, 1989 employment injury. At the time of her injury, she worked as a firefighter. Appellant resigned from work as a firefighter on July 5, 1989 and began working in various other positions.

Appellant underwent multiple right knee surgeries. She returned to full-time work on July 7, 1997 and OWCP paid her compensation based on a loss of wage-earning capacity. Appellant subsequently sustained right knee strain under file number xxxxxx432, which was combined under the current file number.

Dr. Eaton performed a total right knee arthroplasty on April 7, 2013. OWCP, on May 15, 2013, indicated that appellant sustained a recurrence of disability beginning April 7, 2013 and set aside the loss of wage-earning capacity determination. On May 17, 2013 it informed her that it had accepted that she was entitled to compensation for total disability beginning April 7, 2013. OWCP paid appellant wage-loss compensation for total disability until November 15, 2014. It advised her on November 19, 2014 that it had stopped her compensation as CA-1032 forms indicated that she had performed work since January 2011. OWCP subsequently found that the June 27, 2014 report from Dr. Eaton established that appellant had no employment-related disability beginning February 17, 2014.

The Board finds that OWCP failed to properly rescind acceptance of a period of disability. OWCP accepted that appellant sustained a recurrence of total disability and paid her compensation from April 7, 2013 to November 15, 2014. It subsequently found that she had no disability effective February 17, 2014, which constituted a rescission of acceptance of the claim for the period February 17 to November 15, 2014. As OWCP was attempting to rescind acceptance of a period of wage-loss compensation, it must follow its established procedures for rescinding her benefits. Its procedures require a proposed and final decision rescinding the original finding.¹³ These procedures further provide that a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded. The evidence used to rescind the claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated and why the original decision is now being invalidated.¹⁴

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.19(d) (February 2013).

¹³ *Id.* at Chapter 2.1400.19(b) (February 2013).

¹⁴ *Id.* at Chapter 2.1400.19(d).

OWCP did not follow the specific procedures for a rescission decision and did not inform appellant correctly and accurately of the basis of its rescission decision.¹⁵ It did not notify her that her claim for disability compensation was being rescinded and did not mention the applicable legal standard or that it held the burden of proof for rescinding an accepted benefit. The Board thus finds that OWCP failed to follow its procedures to properly rescind acceptance of disability for disability beginning February 17, 2014.¹⁶

As noted in *D.V.*,¹⁷ OWCP has the burden of proof to establish that appellant is not entitled to receive compensation for wage loss for the periods February 17 through November 15, 2014. This is based on the principle noted above that OWCP has the burden to terminate compensation. OWCP advised appellant in a letter dated May 17, 2013 that she had established entitlement to wage-loss compensation beginning April 7, 2013 and paid her compensation on the periodic rolls until November 15, 2014. Having accepted the claim and a period of disability, the burden is now on OWCP to rescind acceptance of the period of disability¹⁸

OWCP based its *de facto* rescission on its finding that Dr. Eaton had released her to resume appellant regular employment. In a report dated June 27, 2014, Dr. Eaton advised that he had released her to return to her usual work effective February 17, 2014 at her request. In a prior report dated September 3, 2013, he found that appellant had permanent work restrictions following her right knee arthroplasty, including no walking more than four hours per day, standing more than one hour per day, or pushing, pulling, or lifting. It is not clear whether, in his June 27, 2014 report, Dr. Eaton released her to resume her predate-of-injury position as a firefighter, a position she had not held since 1989, or to work in positions held since that time. The need for clarification is particularly necessary in view of the permanent work restrictions set forth in his September 2013 report. The medical evidence from Dr. Eaton, consequently, is insufficient to support OWCP's rescission of its finding that appellant had established entitlement to wage-loss compensation from February 17 through November 19, 2014.¹⁹

The remaining evidence is similarly insufficient to meet OWCP's burden of proof to establish rescission. In a report dated August 3, 2016, Dr. Duddy discussed Dr. Eaton's finding that she could return to full-time regular work post arthroplasty. He determined that appellant could not work as a firefighter, but could perform medium work. The Board thus finds that OWCP failed to provide a clear explanation of its rationale for rescission. Consequently, it did not meet its burden of proof to rescind acceptance of total disability for the period February 17 to November 15, 2014.²⁰

¹⁵ See *S.R.*, Docket No. 12-1401 (issued December 11, 2012).

¹⁶ See *R.C.*, Docket No. 16-0594 (issued December 1, 2016).

¹⁷ Docket No. 11-1629 (issued February 3, 2012).

¹⁸ See *M.G.*, Docket No. 10-818 (issued March 21, 2011) (OWCP must provide a clear explanation with rationale for rescinding acceptance of surgery and accompanying disability).

¹⁹ See *D.H.*, Docket No. 13-1885 (issued May 12, 2014) (finding that OWCP did not meet its burden of proof to rescind acceptance when it based its rescission on a conclusory report from an OWCP medical adviser).

²⁰ See *supra* note 16.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to rescind its finding that appellant sustained a recurrence of disability from February 17 to November 15, 2014.

ORDER

IT IS HEREBY ORDERED THAT the September 12 and July 5, 2016 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 29, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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