

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

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

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**Docket No. 17-0288
Issued: May 23, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 21, 2016 appellant, through counsel, filed a timely appeal from an October 13, 2016 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.

ISSUE

The issue is whether OWCP properly rescinded its acceptance of appellant's claim for post-traumatic stress disorder (PTSD) as causally related to a July 11, 2012 employment injury.

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.*

FACTUAL HISTORY

On July 24, 2012 appellant, then a 59-year-old business solutions specialist, filed a traumatic injury claim (Form CA-1) alleging that on July 11, 2012 he injured his back, shoulder, and knee taking a laptop out of his vehicle. He stopped work on July 11, 2012 and did not return. OWCP accepted the claim for a partial thickness tear of the infraspinatus tendon of the right shoulder, moderate tendinosis of the long head of the right biceps tendon, lumbosacral sprain, and a left knee contusion.³ It paid compensation for total disability from August 26, 2012 until June 28, 2013.

Dr. Vincent J. Morello, a clinical psychologist, performed psychological testing on December 14, 2013. He noted that appellant received counseling from a social worker through the Employee Assistance Program (EAP) at work in April 2012 after his supervisor failed to give him credit for a large sale and required him to commute daily to Philadelphia, PA. Appellant's symptoms had decreased until the July 2012 work accident. Dr. Morello reviewed the medical records and conducted psychological testing, noting that appellant had an extremely high score for traumatic stress. He indicated that the July 2012 injury caused multiple stressors, including pain from the injury. Dr. Morello related, "At this time, [appellant] shows clear symptoms of [PTSD]. He ruminates on and is mentally preoccupied with his current physically debilitating condition and displays considerable anger toward his former employer for various perceived injustices." Dr. Morello advised that many factors may have contributed to the PTSD, but that the July 2012 injury "played the key role initiating a series of events that, combined, added to the severity of the disorder." He opined that appellant was disabled from employment.

On December 27, 2013 appellant, through counsel, requested expansion of his claim to include a psychiatric condition. In a January 17, 2014 response, OWCP noted that it had not received claims for compensation (Forms CA-7) since July 2013 and explained the medical evidence required to establish a consequential condition.⁴

On December 4, 2014 OWCP informed appellant that it had expanded acceptance of his claim to include PTSD.

OWCP, on January 12, 2015, referred appellant to Dr. Irving S. Wiesner, a Board-certified internist and psychiatrist, for a second opinion evaluation regarding whether appellant had sustained an emotional condition causally related to factors of employment set forth in the statement of accepted facts (SOAF). The SOAF provided the history of the July 11, 2012 work injury and noted the accepted conditions.

In a report dated February 9, 2015, Dr. Wiesner discussed the history of the July 11, 2012 employment injury and provided findings on examination. He diagnosed dysthymic disorder,

³ On September 13, 2012 OWCP had denied appellant's claim as the medical evidence was insufficient to establish a diagnosed condition causally related to the accepted work incident. In a decision dated April 15, 2013, however, an OWCP hearing representative reversed the September 13, 2012 decision.

⁴ By letter dated August 7, 2014, OWCP advised that it was not able to expand the claim as appellant had not submitted evidence from a licensed psychologist. In a response dated September 26, 2014, Dr. Morello noted that he was a licensed clinical psychologist.

generalized anxiety disorder, adjustment disorder with anxiety and depression, attention deficit disorder, and a mixed personality disorder with marked anger and denial. Dr. Wiesner related, “It is my medical opinion that [appellant] is suffering from a severe personality disorder that has long preceded what has happened. [Appellant] has been discontent with his work at the [employing establishment] from the very beginning. His degree of anger is far beyond rational.” He questioned the PTSD diagnosis given that it required a traumatic event that threatened death or significant injury to the self or others. Dr. Wiesner observed, “This does not at all seem to fit [appellant’s] clinical presentation or his history, in that the most significant part of his disability is his intense anger as to how the [employing establishment] has been treating him. In my medical opinion, this is not the grounds for diagnosis of [PTSD].” Dr. Wiesner opined that employment did not cause appellant’s emotional condition, but that his condition was aggravated “by his perceived mistreatment.”

OWCP, by letter dated March 20, 2015, notified appellant of its proposed rescission of the accepted condition of PTSD and his entitlement to benefits due to that condition. It advised him that Dr. Morello’s opinion was speculative in nature and that it had therefore referred him for a second opinion examination. OWCP informed appellant that a conflict existed between his attending physician and Dr. Wiesner regarding whether he had PTSD. It further noted that it had not established as factual his allegations regarding his treatment by the employing establishment.

OWCP, on March 27, 2015, paid appellant compensation for total disability from June 29, 2013 to January 11, 2014.⁵

In an April 27, 2015 letter, Dr. Morello disagreed with OWCP’s finding that his December 14, 2013 report was speculative. He explained how he reached the diagnosis of PTSD based on test results, his evaluation, history, and a review of the record.

On April 7, 2015 OWCP referred appellant to Dr. Gladys Fenichel, a Board-certified psychiatrist, for an impartial medical examination. In a report dated June 30, 2015, Dr. Fenichel noted that OWCP proposed rescinding its acceptance of PTSD. She reviewed the SOAF and the medical evidence of record. Following an evaluation, Dr. Fenichel diagnosed persistent depressive disorder, a generalized anxiety disorder, and a mixed personality disorder with intense anger. She opined that appellant did not have PTSD causally related to events from the SOAF, noting that he did not fulfil the necessary criteria of exposure to “actual threatened death, serious injury, or sexual violence....” Dr. Fenichel found that he did not have “an emotional/psychiatric condition that affects his ability to function in everyday activities.” She advised that appellant’s mood was “consistent with the condition of a personality disorder. He does not have a disabling condition of depression or anxiety. If he chooses to do so, [he] has the capacity to give or take supervision, cooperate with others, and work under deadlines.... [Appellant] did not experience an event in the workplace that would prevent him from returning to work from a psychiatric perspective.”

⁵ On April 27, 2015 Dr. Joseph A. Calamia, an osteopath, advised that he had treated appellant for 25 years and that he had a minimal psychiatric history until his injury. He discussed his difficulties obtaining workers’ compensation.

By decision dated July 2, 2015, OWCP rescinded acceptance of appellant's claim for PTSD effective that date. It found that Dr. Fenichel's opinion represented the special weight of the evidence and established that he did not have a psychiatric condition due to an employment factor as set forth in the SOAF.

Appellant, through counsel, on July 10, 2015 requested a telephone hearing. At the telephone hearing, held on February 29, 2016, he described his injury and related that he had not worked since July 11, 2012.

By decision dated April 4, 2016, an OWCP hearing representative affirmed the July 2, 2015 decision. He found that the weight of the evidence supported OWCP's rescission of its acceptance of PTSD as due to the July 11, 2012 employment injury.

On July 27, 2016 appellant, through counsel, requested reconsideration. He submitted the results of an April 11 and 18, 2016 psychological evaluation by Dr. Erica Avello, a psychologist. Dr. Avello opined that appellant's test results showed recurrent, severe major depressive disorder with moderate-to-severe anxiety distress and other specified personality disorder. She found that his depressive disorder resulted from "vocational events, physical injuries and subsequent frustrations in dealing with related details." Dr. Avello noted that appellant related that he received disability but not compensation "for the damages he sustained" after his injury. He asserted that he did "not qualify for a diagnosis of PTSD."

By decision dated October 13, 2016, OWCP denied modification of its April 4, 2016 decision. It found that Dr. Avello determined that appellant did not have PTSD. Dr. Avello further did not explain what aspect of the work injury caused emotional distress.

On appeal counsel generally asserts that the evidence is insufficient to support a rescission.

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 her 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

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.⁹ It is well

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 *L.C.*, 58 ECAB 493 (2007).

established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.¹⁰ Its burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.¹¹

ANALYSIS

OWCP accepted that on July 11, 2012 appellant sustained a partial thickness tear of the infraspinatus tendon of the right shoulder, moderate tendinosis of the right biceps tendon, lumbosacral sprain, and a left knee contusion. In a report dated December 14, 2013, Dr. Morello, an attending physician, diagnosed PTSD due in part to the July 2012 employment injury. On December 4, 2014 OWCP expanded acceptance of the claim to include PTSD.

On February 9, 2015 Dr. Wiesner, an OWCP referral physician, opined that appellant had a preexisting personality disorder. He noted that a diagnosis of PTSD required the threat of death or physical injury to the self or others, which varied from appellant's history. Dr. Wiesner opined that appellant did not have PTSD and that his employment did not cause his emotional condition.

OWCP determined that a conflict arose between Dr. Morello and Dr. Wiesner regarding whether appellant had PTSD. It referred him to Dr. Fenichel for an impartial medical examination. Based upon her report, OWCP rescinded its acceptance of employment-related PTSD.

The Board finds that OWCP provided sufficient rationale to justify the rescission of acceptance of appellant's claim for PTSD.¹² Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹³

In a June 30, 2015 report, Dr. Fenichel reviewed appellant's history and the medical reports of record and the findings upon her evaluation. She diagnosed depressive disorder, a generalized anxiety disorder, and a mixed personality disorder with significant anger. Dr. Fenichel determined that appellant did not have PTSD due to events set forth in the SOAF as he did not meet the exposure criteria of threatened death, serious injury, or sexual violence. She opined that he did not have employment-related PTSD or any emotional condition causing disability from employment. The Board finds that Dr. Fenichel accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions

¹⁰ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

¹¹ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹² *See R.H.*, Docket No. 08-1961 (issued April 17, 2009).

¹³ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

about appellant's condition which comported with her findings.¹⁴ Her opinion, which is well-rationalized and based upon a proper factual and medical background, is entitled to the special weight of the evidence and establishes that appellant does not have PTSD due to his accepted work injury.¹⁵

In a report dated April 18, 2016, Dr. Avello interpreted psychological testing as showing recurrent, severe major depressive disorder with moderate to severe anxiety distress and other specified personality disorder. She attributed appellant's depressive disorder to physical injuries, vocational issues, and frustration dealing with the events. Dr. Avello opined that he did not have PTSD, and thus her opinion supports the rescission of acceptance of this condition.

On appeal counsel maintains that the evidence of record was insufficient to support a rescission. However, OWCP provided a clear explanation of its rationale for rescission in determining that Dr. Fenichel's opinion as impartial medical examiner represented the special weight of the evidence.¹⁶ The Board, consequently, finds that it met its burden of proof in rescinding acceptance of PTSD.

CONCLUSION

The Board finds that OWCP properly rescinded its acceptance of appellant's claim for PTSD as causally related to a July 11, 2012 employment injury.

¹⁴ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁵ *See supra* note 12.

¹⁶ *See K.H.*, Docket No. 13-1723 (issued June 17, 2014); *Amelia S. Jefferson*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2017
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