



## **ISSUES**

The issues are: (1) whether OWCP properly rescinded acceptance of a recurrence of disability for the period April 29 through November 28, 2014; and (2) whether appellant had established a recurrence of disability on April 29, 2014.

On appeal counsel asserts that OWCP improperly issued the January 20, 2016 decision because on December 5, 2014 appellant timely requested reconsideration of OWCP's December 17, 2013 merit decision that denied modification of its March 18, 2013 suitable work termination. He asserts that, as OWCP based its conclusions in the January 20, 2016 decisions on its March 18, 2013 suitable work termination, these decisions were improperly issued.

## **FACTUAL HISTORY**

On December 7, 2011 OWCP accepted appellant's traumatic injury claim (Form CA-1) for a left sprain of shoulder and rotator cuff, which occurred on November 15, 2011. Dr. Donald P. Douglas, a Board-certified orthopedic surgeon, performed authorized arthroscopic debridement of the left shoulder on May 22, 2012. Appellant remained off work following the surgery. OWCP paid wage-loss compensation.

On January 15, 2013 the employing establishment offered appellant a secretary (automation) position, based on the restrictions provided by Dr. Robert Ungerer, a Board-certified orthopedic surgeon and OWCP referral physician who examined her on February 15 and December 19, 2012.

By letter dated January 15, 2013, OWCP advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her entitlement to wage-loss or schedule award compensation would be terminated. She was given 30 days to respond.

Appellant refused the offered position on January 28, 2013, stating that she was disabled due to the employment injury. On February 1, 2013 she disagreed with the proposed termination. By letter dated February 19, 2013, OWCP advised appellant that her reasons for refusing the offered position were not valid. Appellant was given an additional 15 days to accept. In medical reports dated February 25, 2013, Dr. Douglas noted that she continued to have left shoulder pain and limited motion. He advised that appellant was totally disabled. She did not accept the position.

By decision dated March 18, 2013, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 15, 2013.

Appellant requested reconsideration on October 24, 2013. She submitted additional reports from Dr. Douglas dated April 8 to October 16, 2013 in which he diagnosed chronic left shoulder pain and adhesive capsulitis and advised that she was totally disabled. On June 10, 2013 Dr. Douglas requested authorization for additional surgery.

In a merit decision dated December 17, 2013, OWCP denied modification of the March 18, 2013 decision.

OWCP authorized additional surgery, and on April 29, 2014 Dr. Douglas performed arthroscopic manipulation of left shoulder for adhesive capsulitis. On July 31, 2014 it accepted appellant's claim for a recurrence of disability (Form CA-2a) beginning April 29, 2014. OWCP paid appellant wage-loss compensation beginning that day.<sup>3</sup>

On December 5, 2014 appellant, through counsel, requested reconsideration of the December 17, 2013 decision. He asserted that the position offered appellant was not suitable, based on the medical evidence, and that OWCP had not accepted all compensable injuries caused by the November 15, 2011 employment injury. Counsel also submitted a February 21, 2014 report in which Dr. Douglas reiterated his request for surgery due to arthrofibrosis/scarring of the shoulder.

By decision dated February 9, 2015, OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing. It noted that the March 18, 2013 termination decision remained in effect and she had erroneously been paid compensation for the period April 29 through November 28, 2014. In separate correspondence dated February 9, 2015, OWCP issued a preliminary finding that an \$18,366.83 overpayment of compensation had been created because appellant received compensation for the period April 29 through November 28, 2014 to which she was not entitled because her entitlement to wage-loss benefits had been terminated in March 2013.

Appellant requested a preresoupment hearing with OWCP's Branch of Hearings and Review and, by decision dated September 4, 2015, an OWCP hearing representative remanded the case to OWCP because it had not properly rescinded acceptance of the recurrence of disability which formed the basis of the overpayment.

On December 8, 2015 OWCP issued a notice of proposed rescission of acceptance of the recurrence of disability for which appellant was paid compensation for the period April 29 through November 28, 2014. It found that the July 31, 2014 decision had been issued in error because her entitlement to wage-loss and schedule award compensation benefits had been terminated by decision dated March 18, 2013 based on her refusal to accept suitable employment. OWCP finalized the rescission on January 20, 2016. In a separate January 20, 2016 decision, it denied appellant's claim for a recurrence of disability beginning April 29, 2014 and continuing through November 28, 2014.

### **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.<sup>4</sup> The Board has

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<sup>3</sup> The employing establishment noted that appellant had not worked since May 2012, and that OWCP had issued a March 17, 2013 decision terminating her entitlement to monetary compensation because she refused an offer of suitable work.

<sup>4</sup> 5 U.S.C. § 8128; *see M.E.*, 58 ECAB 694 (2007).

upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.<sup>5</sup> 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.<sup>6</sup>

Once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, it later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.<sup>7</sup>

OWCP regulations provide that a timely reconsideration request must be received by it within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(3) of its regulations.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for decision.

The basis for each OWCP decision issued by OWCP subsequent to its acceptance of the April 29, 2014 recurrence of disability flows from its March 18, 2013 decision in which appellant's entitlement to wage-loss and schedule award compensation was terminated in accordance with section 8106(c) of FECA because she failed to accept suitable employment. In a merit decision dated December 17, 2013, OWCP denied modification of the March 18, 2013 decision. The record before the Board in this case indicates that appellant, through counsel, timely requested reconsideration of the December 17, 2013 decision on December 5, 2014. The record before the Board does not contain an OWCP decision responsive to this request.

The next OWCP decision of record is the February 9, 2015 merit decision in which OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing. On that date it also issued a preliminary overpayment decision finding an overpayment of compensation because appellant had received \$18,366.83 in FECA compensation in error for the period April 29 through November 28, 2014, after her entitlement to wage-loss compensation had been terminated. The preliminary overpayment decision was remanded to OWCP by its Branch of Hearings and Review on September 4, 2015. The hearing representative noted that OWCP had not properly rescinded acceptance of the April 29, 2014 recurrence of disability which formed the basis of the overpayment. On

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<sup>5</sup> S.R., Docket No. 14-1313 (issued January 22, 2015).

<sup>6</sup> See *Cary S. Brenner*, 20 C.F.R. § 10.610.

<sup>7</sup> See S.R., Docket No. 09-2332 (issued August 16, 2010).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(a).

December 8, 2015 OWCP issued a notice of proposed rescission of its acceptance of the April 29, 2014 recurrence of disability. It finalized the rescission by decision dated January 20, 2016. In a separate January 20, 2016 decision, OWCP denied appellant's claim for a recurrence of disability beginning April 29, 2014.

Proceedings under FECA are not adversarial in nature. OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done.<sup>10</sup> The January 20, 2016 decisions at issue in this case flowed from OWCP's March 18, 2013 suitable work termination decision that was affirmed in a December 17, 2013 merit decision. Appellant, through counsel, had timely filed a reconsideration request from the December 17, 2013 decision. In the December 5, 2014 reconsideration request, counsel made cogent legal arguments and submitted additional medical evidence.

The Board has long held that OWCP shall review all evidence submitted by a claimant and received by OWCP prior to issuance of its decision.<sup>11</sup> OWCP procedures also provide that a final decision on a reconsideration request must be issued, and the goal for issuing such decision is 90 days from receipt of the request.<sup>12</sup>

In the case *Kenneth E. Harris*, the Board held that OWCP issued a decision in error, as there was an outstanding request for reconsideration which remained unadjudicated.<sup>13</sup> In the case at hand, it was improper for OWCP to issue further decisions, including the January 20, 2016 decisions before the Board in the present appeal, without addressing the arguments and evidence submitted with appellant's December 5, 2014 reconsideration request.<sup>14</sup> Thus, this case must be remanded to OWCP to issue an appropriate decision on her December 5, 2014 reconsideration request before addressing rescission or a recurrence of disability.

In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>10</sup> *P.K.*, Docket No. 08-2551 (issued June 2, 2009).

<sup>11</sup> See *Kenneth R. Love*, 50 ECAB 193 (1998).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2.b (October 2011).

<sup>13</sup> 54 ECAB 502 (2003).

<sup>14</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2016 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: October 4, 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