

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

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<b>W.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1390</b>
	)	<b>Issued: April 23, 2018</b>
<b>DEPARTMENT OF THE AIR FORCE, AIR</b>	)	
<b>NATIONAL GUARD, Schenectady, NY,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 8, 2017 appellant filed a timely appeal from April 28 and May 1, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish a recurrence of total disability commencing April 8, 2002 caused by the accepted January 3, 1996 employment conditions; (2) whether OWCP met its burden of proof to rescind acceptance of a September 20, 2006 recurrence; and, if so, (3) whether appellant met his burden of proof to establish a recurrence of total disability commencing September 20, 2006.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 3, 1996 appellant, then a 46-year-old aircraft mechanic foreman, injured his back while moving lockers while in the performance of duty. He stopped work on January 8, 1996 and worked intermittently before returning to full duty on October 5, 1998. OWCP initially accepted lumbosacral strain. It subsequently expanded acceptance of the claim to include displacement of a lumbar intervertebral disc without myelopathy and other bilateral acquired deformities of the ankle and foot. On August 14, 1996 Dr. Frank Genovese, a Board-certified neurological surgeon, performed left L4-5 hemilaminectomy and microdiscectomy.<sup>3</sup>

Appellant was suspended without pay by the employing establishment, effective April 21, 2002, and terminated for cause, effective September 12, 2002, for conduct unbecoming of a National Guard technician and for abuse of government property. He was incarcerated from November 17, 2003 until September 5, 2006 for a class E felony conviction unrelated to his compensation claim.

In a September 25, 2006 report, Dr. Peter F. Diamond, an osteopath Board-certified in family medicine, advised that appellant had workers' compensation-related lumbar disc disease. Examination revealed weakness in the left leg, positive straight leg raise at 45 degrees, no muscular atrophy, normal pulses, and decreased range of motion of the lumbar spine. Dr. Diamond recommended physical therapy.

On April 13, 2007 appellant filed a notice of recurrence (Form CA-2a) claim. He alleged that the recurrence occurred on September 20, 2006 when he was playing with his grandchildren and felt a sharp low back pain and a loss of strength in his low back and left leg, which caused him to fall. Appellant explained that he had numbness and pain in his toes, low back pain radiating down his left leg, and sharp left buttock pain. He advised that he did not fully recover from his work injury which worsened over time, disabled him, and limited his activity.

In a July 10, 2007 report, Dr. Genovese advised that appellant progressively complained of low back difficulty and intermittent flare ups. He noted that appellant was out of work since 2002 when he was suspended from the employing establishment. On examination Dr. Genovese noted positive single leg raise, inability to heel walk on the left, 4/5 strength in the left dorsiflexor hallucis longus, and decreased pinprick from the ankle down on the left.

On August 27, 2007 Dr. Paul Salerno, a Board-certified physiatrist, noted that appellant was injured in a January 3, 1996 work accident. Appellant worked until 2002, but had since been

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<sup>2</sup> Docket No. 16-0715 (issued August 11, 2016). *See discussion infra.*

<sup>3</sup> A July 12, 1996 magnetic resonance imaging (MRI) scan of the lumbar spine showed a disc herniation at L4-5 and degenerative disc disease from L2-3 through L5-S1. A November 16, 1998 lumbosacral spine MRI scan demonstrated postoperative changes and more prominent multilevel degenerative disc disease from L2-3 through L5-S1 with a small disc herniation at L3-4 and a disc bulge at L4-5.

unemployed due to his back. Dr. Salerno opined that appellant was unable to return to work as an aircraft mechanic. He injected appellant's spine on September 13, 2007.

In a September 14, 2007 note, Dr. Diamond advised that he had been appellant's physician for 20 years and opined that, in the last one to two years, the 1996 employment injury resulted in permanent disability.<sup>4</sup> On January 8, 2008 he advised that appellant was experiencing left foot weakness, chronic low back pain, lumbar disc disease with L4-5, L5-S1 radiculopathy bilaterally, and foot drop, worse on the left. Dr. Diamond opined that appellant had been totally disabled since April 2002. In a January 14, 2008 work capacity evaluation (Form OWCP-5c), he advised that appellant was unable to return to his date-of-injury position. Dr. Diamond noted that appellant had a herniated disc at L4-5, chronic low back pain and left foot weakness.

Dr. Salerno submitted treatment notes dated October 11, 2007 to January 24, 2010. He described appellant's pain management including injections, but did not comment on his ability to work or the cause of his diagnosed condition.

On June 24, 2008 appellant filed a claim for compensation (Form CA-7) for intermittent periods of disability from April 10, 2002 to the present. The second page of the claim form was not completed.

By letter dated May 5, 2009, the employing establishment controverted appellant's claim. It explained that, when he was suspended without pay in April 2002, after being indicted on felony charges, he had been working full duty since October 5, 1998. The employing establishment explained that appellant was subsequently terminated as his criminal conduct had a nexus to his federal employment.<sup>5</sup> It contended that he was not entitled to compensation and that he either materially misrepresented facts to OWCP or concealed material facts.

In a February 4, 2010 letter, OWCP informed appellant of the evidence needed to establish a recurrence of disability and advised him to submit a recurrence claim (Form CA-2a). On February 18, 2010 appellant filed a recurrence claim, indicating that the recurrence occurred on April 10, 2002. He described his symptoms and stated that he never returned to work after that date. The employing establishment noted that appellant was suspended effective April 21, 2002.

In a February 23, 2010 report, Dr. Diamond advised that appellant had a work injury in January 1996, which resulted in a back injury and a consequential chronic left foot drop that caused frequent tripping and falling. On examination he noted that appellant had difficulty with straight leg raising on the left past 30 degrees, obvious left foot drop with an absent ankle jerk on the left, and some stiff spasmodic diminished range of motion of the lumbosacral spine. Dr. Diamond diagnosed chronic left foot drop as a result of delayed treatment for a herniated nucleus pulposus at L4-5 and L5-S1. He opined that appellant was permanently disabled without any expected improvement. Dr. Salerno continued to provide pain management.

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<sup>4</sup> A November 1, 2007 electromyograph and nerve conduction velocity study (EMG/NCV) showed chronic active radiculopathy involving the left S1 nerve root, and chronic nerve root changes at left L5, bilateral L4, right L5 and S1 nerve roots.

<sup>5</sup> The employing establishment explained that the basis of appellant's suspension and termination was conduct unbecoming a federal technician and misuse of government-owned computers.

In a March 1, 2010 statement, appellant detailed the history of his injury and treatment. He maintained that Dr. Diamond found that he was disabled for work in March 2002 and had not released him to work since that time. Appellant also submitted reports from Dr. Diamond dated May 2, 1995 to April 10, 2003. On March 20, 2002 Dr. Diamond noted that appellant had known lumbar disc disease and was working, but having some difficulty. An April 10, 2002 progress note reported an onset of severe low back pain the previous day that radiated to the left leg and caused him to fall. Exacerbation of degenerative disc disease with known left foot drop and fall, and left L5 radicular symptoms were diagnosed. An annotated handwritten note related that appellant fell twice the previous day due to his back with tingling and numbness radiating to the left leg. It noted that he would be kept out of work until May 13, 2002. A May 21, 2002 treatment note indicated that appellant was very stressed because he was out of work without pay and was determined to prove his innocence. Straight leg raise was positive and Dr. Diamond diagnosed chronic L5 radiculopathy and left foot drop. On April 10, 2003 he noted that appellant was under increasing stress and had radicular symptoms in both legs. Examination revealed numbness in both great toes, paraspinal lumbar spasm, and positive straight leg raise bilaterally.

In an undated statement received on May 27, 2010, appellant described the January 3, 1996 work injury, subsequent medical care, and employment history. He indicated that he fell in July 2009 while coming down stairs at home because his left leg gave out, which was a continuing problem. Appellant concluded that on April 10, 2002 Dr. Diamond placed him off work and permanently disabled him on September 14, 2007, and noted that Dr. Salerno advised appellant that he had permanent damage to the nerves of his left leg. In correspondence dated June 1, 2010, he indicated that he worked a part-time nonfederal position beginning in May or June 2002 for several months. Appellant maintained that his physician released him to work this position because it involved sitting, answering the telephone, and some walking.

In a June 10, 2010 letter, the employing establishment controverted appellant's claim. It noted that his incarceration records indicated that he injured his left shoulder getting out of a bunk bed, injured his right ankle injury due to running, and showed that he ran four miles and did 400 sit-ups each day. The employing establishment contended that medical reports noting that appellant was unemployed due to his back condition were incorrect, as he was in fact unemployed due to his felony conviction. A Notification of Personnel Action (SF-50B) was attached showing that appellant was removed effective September 12, 2002 for conduct unbecoming a National Guard technician and for abuse of government property. The employing establishment forwarded health records from the State of New York Department of Corrections dated January 21, 2004 to August 25, 2006 confirming its report that appellant indicated that he did 400 push-ups daily and injured his left ankle, as well as his left shoulder.<sup>6</sup>

By decision dated September 9, 2010, OWCP denied appellant's claim for recurrence beginning September 20, 2006, finding that the evidence of record did not establish that his work

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<sup>6</sup> The reports were completed by a registered nurse and a nurse practitioner. On January 28 and February 13, 2004 appellant complained of back discomfort. A history of previous back injury was noted. On May 26, 2004 appellant complained of left ankle swelling after he began running in the yard. Rule-out traumatic injury due to running was diagnosed and he was advised that he could continue running. A July 31, 2006 note described appellant's report that he did 400 sit-ups daily. On August 8, 2006 he complained of left shoulder pain. On August 30, 2006 appellant complained that four to five months previously, he slipped while coming off the top bunk, grabbed a bar with his left hand, and felt a tear and had restricted shoulder range of motion, but could still do push-ups.

stoppage or inability to work was caused by a spontaneous worsening of his work-related injury. It also found that injuries sustained while incarcerated from November 17, 2003 to September 5, 2006 and on September 20, 2006 were intervening causes of his current condition.

On March 28, 2011 appellant's then-representative requested reconsideration. He asserted that appellant had recurrences of total disability on April 10, 2002 and September 20, 2006, based on Dr. Diamond's reports. The representative forwarded a September 27, 2010 report in which Dr. Diamond opined that appellant's work-related lumbar disc disease had deteriorated over time and would continue to worsen with permanent, nontreatable radiculopathy and left foot drop. Dr. Diamond noted findings and concluded that appellant's work-related condition led to his current, deteriorating condition.

Dr. Salerno also continued to submit pain management reports. On April 21, 2011 he noted appellant's complaint of radiating low back pain with frequent catching of his left foot due to foot drop. Dr. Salerno described examination findings including restricted lumbar range of motion, and hypertonicity with trigger points throughout the lower lumbar musculature extending into the buttocks with an equivocal seated straight leg raise. He diagnosed acute on chronic low back pain with left greater than right leg pain, numbness, and weakness, status post a January 3, 1996 work injury with progressive worsening over the last several years and symptoms consistent with lumbar facet dysfunction and degenerative disc disease. Dr. Salerno opined that appellant could not work as an aircraft mechanic position due to its bending, twisting, and lifting, but that he could perform a full-time sedentary position.

By decision dated June 15, 2011, OWCP vacated its September 9, 2010 decision and accepted the September 20, 2006 recurrence claim. It explained that the medical evidence of record established that appellant was totally disabled from work during his incarceration and that the September 20, 2006 injury did not break the chain of causation because it would not have occurred had he not previously suffered the January 3, 1996 employment injury.

In correspondence dated July 15, 2011, the employing establishment indicated that it could not complete appellant's CA-7 form as it contained material misrepresentations, noting that he was terminated for acts of serious misconduct unrelated to his employment injury.

Dr. Salerno continued to provide pain management notes, in which he reported findings and listed diagnoses of lumbar intervertebral disc degeneration, postlaminectomy syndrome of the lumbar region, lumbar sprains and strains, and other back symptoms. A January 4, 2012 MRI scan of the lumbar spine demonstrated a disc protrusion at L3-4, and disc bulges at L1-2, L2-3, L4-5, and L5-S1.

In a letter dated May 23, 2012, OWCP advised appellant that it could take no further action on his claims for compensation because it had not received the back page of the form signed by the employing establishment. By letter dated July 3, 2012, the employing establishment reiterated that it could not sign appellant's CA-7 claims as the forms contained material misrepresentations.

It referenced the Board case *John W. Normand*,<sup>7</sup> and continued to assert that he was ineligible for compensation because of his removal for cause.<sup>8</sup>

On September 13, 2012 appellant elected FECA benefits, effective April 10, 2002. In a September 24, 2012 letter, OWCP noted receipt of his election. It advised appellant that it had only accepted his recurrence beginning on September 20, 2006 and that his entitlement to FECA benefits could begin only on that date. OWCP asked that he resubmit a Form CA-7 and indicate receipt of any benefits from the Office of Personnel Management (OPM). On September 29, 2012 appellant elected FECA benefits, effective September 20, 2006. He submitted a Form CA-7 on September 28, 2012, claiming wage-loss compensation from September 20, 2006 to September 28, 2012.

On February 19, 2013 OWCP asked the employing establishment to provide appellant's pay rate information as of April 10, 2002.<sup>9</sup>

In a May 1, 2013 treatment note, Dr. Salerno noted appellant's continued complaints of radiating low back pain. He performed an EMG/NCV that day and noted findings that included increased insertional activity in the left lumbar paraspinal and left sacroiliac root innervated muscles with evidence of chronic changes in the right S1 and left L5 root innervated muscles suggesting prior injury.

On October 8, 2014 OWCP proposed to rescind the acceptance of appellant's recurrence claim beginning September 20, 2006. It noted that he had worked full duty for over three years at the time of his suspension and termination for cause, and that he served a prison sentence from November 2003 to September 2006. OWCP found that, as appellant's work stoppage was not caused by inability to work due to the accepted conditions, he did not establish a recurrence of disability.

In October 27, 2014 correspondence appellant's representative, disagreed with the proposed rescission. He asserted that, based on Dr. Diamond's April 10, 2002 report, appellant was totally disabled at the time of his suspension on April 21, 2002. The representative further maintained that appellant's dependents were entitled to wage-loss compensation while he was imprisoned and that OWCP misapplied its procedures and the standards in *Normand*.

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<sup>7</sup> 39 ECAB 1378 (1988). (Appellant did not establish disability from work beginning on the date of termination for cause because the medical evidence was insufficient to establish that he was unable to perform his assigned duties due to the accepted left shoulder condition on the date of his termination).

<sup>8</sup> The employing establishment continued to maintain that it could not complete appellant's CA-7 form as it contained material misrepresentations, noting that he was terminated for serious misconduct unrelated to his work injury. In a January 29, 2014 letter, OWCP informed the employing establishment that a careful analysis of *Normand* showed that, even if a claimant stopped work for reasons unrelated to the accepted employment injury, he would be entitled to compensation if he was still disabled, *i.e.*, unable to earn the wages he was receiving on his date of injury.

<sup>9</sup> On April 15, 2013 OWCP notified OPM that appellant had elected FECA benefits effective September 20, 2006. OPM notified OWCP on April 17, 2014 that his annuity commenced May 12, 2011 and continued through March 31, 2014. On July 24, 2014 OWCP informed OPM that appellant was not receiving FECA benefits and asked that his OPM annuity be reinstated. Appellant's OPM annuity was reinstated effective April 1, 2014.

Dr. Salerno continued to provide pain management. On March 5, 2015 he noted continued complaints and advised that the most recent imaging studies indicated that appellant was getting more lumbar facet dysfunction.

In a May 15, 2015 decision, OWCP finalized the rescission of its June 15, 2011 acceptance of appellant's September 20, 2006 claimed recurrence as he was not employed on that date, there was no recurrence of disability at that time. In a separate May 15, 2015 decision, it denied that he sustained a recurrence of disability on September 20, 2006, finding that the evidence then of record was insufficient to establish that he was disabled due to a material change or worsening of the accepted conditions on that date and, as he was not employed on that date, there was no recurrence of disability at that time.

On July 23, 2015 appellant's then-representative, requested reconsideration of both May 15, 2015 decisions. He asserted that OWCP did not follow its procedures in its decisions.

In October 8, 2015 correspondence, the employing establishment reiterated that appellant worked full duty from October 1998 until he was suspended in April 2002 and then terminated for cause effective September 12, 2002. It reiterated that his work stoppage was due to reasons unrelated to his accepted injury. The employing establishment forwarded appellant's indictment and information about his incarceration.

An October 20, 2015 lumbar spine MRI scan showed mild disc osteophyte complexes at multiple levels with left greater than right foraminal compromise in the lower lumbar spine exacerbated by facet arthropathy. A November 9, 2015 lower extremity EMG/NCV suggested a chronic active lumbar spinal radiculopathy involving the left leg, and chronic changes in the bilateral S1 and right L5 root innervated muscles suggesting prior injury. Dr. Salerno reviewed the study and continued treating appellant. In January 2016, he performed a series of lumbar injections.

By decision dated February 9, 2016, OWCP denied modification of its prior decisions. On February 29, 2016 appellant appealed to the Board. While the case was on appeal, Dr. Salerno continued to provide treatment in which he described appellant's complaints and findings. He performed additional lumbar injections and diagnosed other intervertebral disc degeneration, lumbosacral region, postlaminectomy syndrome, not elsewhere classified, muscle spasm of back, and spinal enthesopathy, lumbar region.

In an August 11, 2016 decision, the Board found that OWCP did not meet its burden of proof to rescind acceptance of appellant's recurrence of disability on September 20, 2006.<sup>10</sup> The Board noted that OWCP incorrectly found that he could not have sustained a recurrence of disability on September 20, 2006 as he was not employed at that time. The Board indicated that where employment has been terminated for misconduct and disability is subsequently claimed, such as in *Ralph Dennis Flanagan*,<sup>11</sup> the term disability under FECA means incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury. Disability can be established despite termination for cause, if medical evidence establishes

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<sup>10</sup> *Supra* note 2.

<sup>11</sup> Docket No. 94-1569 (issued May 28, 1996).

that the claimant could not work due to the accepted work injury for a given period after the termination.<sup>12</sup> The Board noted that, as in the case *V.M.*,<sup>13</sup> even if a claimant were terminated for misconduct, disability benefits would be payable if the evidence established that the claimant was unable to work at some point thereafter due to a work-related disabling condition.<sup>14</sup> The Board concluded that, instead of focusing on the fact that appellant was terminated for cause and that he was not employed as of September 20, 2006, OWCP should have analyzed whether medical evidence established that he sustained 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.<sup>15</sup>

On November 18, 2016 OWCP again accepted that on September 20, 2006 appellant had a recurrence of disability. It noted the accepted conditions and advised him how to file claims for compensation. In letters dated November 27 and 29, and December 6, 2016 appellant's representative noted that CA-7 form claims for compensation had previously been submitted.

Dr. Salerno continued to submit reports describing appellant's status. On January 9, 2017 he noted appellant's continued complaint of ongoing radiating low back pain. Findings included reduced lumbar spine range of motion in all planes, grossly positive testing for lumbar facet dysfunction bilaterally, grossly intact reflexes, and down going toes with evidence of giveaway weakness, and no significant atrophy. Sensory testing to light touch and pinprick revealed patchy dysesthesias hypertonicity. Dr. Salerno reviewed the October 2015 MRI scan study. He diagnosed other intervertebral disc degeneration, lumbosacral region, postlaminectomy syndrome, not elsewhere classified, muscle spasm of back, and spinal enthesopathy, lumbar region.

In January 2017, OWCP referred appellant to Dr. Kevin Scott, a Board-certified orthopedic surgeon, for a second-opinion evaluation.<sup>16</sup> In a January 18, 2017 report, Dr. Scott noted the history of injury, his review of the records and appellant's complaint of continuing back pain. Examination showed decreased lumbar range of motion, weakness of the dorsiflexors of his ankle, a positive straight leg raise on the left, and palpable tenderness with occasional spasms of the lumbar spine. Dr. Scott diagnosed status post lumbar hemilaminectomy at L5-S1 with continued back pain. He advised that appellant continued to need treatment for his work injury, noting that following lumbar spine injuries of 1980 and 1983 he was able to work with difficulty, and that the injury that occurred in 1996 was the most significant injury. Dr. Scott opined that appellant's current disability was due to employment injuries and that he could not return to his date-of-injury job. He indicated that appellant could work at a seated job with lifting restricted to five pounds and no bending or twisting. On an attached work capacity evaluation (OWCP-5c), Dr. Scott advised that appellant could work four hours of limited-duty daily.

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<sup>12</sup> *Id.*

<sup>13</sup> Docket No. 16-0062 (issued May 18, 2016).

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

<sup>15</sup> 20 C.F.R. § 10.5(x).

<sup>16</sup> Dr. Scott was provided a medical record, a statement of accepted facts, a set of questions, and a position description for aircraft mechanic supervisor.

By development letter dated February 10, 2017, OWCP informed appellant of the evidence needed to support his recurrence claims. It included a questionnaire for his completion and asked that he provide a comprehensive medical evaluation. Appellant was afforded 30 days to respond.

On February 6, 2017 Dr. Salerno repeated his January 9, 2017 findings.

On March 15, 2017 OWCP again proposed to rescind acceptance of appellant's recurrence of disability of September 20, 2006. It found that the evidence did not show that the claimed recurrence was due to the accepted injury and that he stopped work for reasons unrelated to his work injury. OWCP noted that Dr. Salerno and Dr. Diamond did not explain why appellant could work full duty for four years and suddenly, when suspended, could no longer perform his job duties due to lumbar disc disease. It also noted that the record supported that appellant had worked in private employment and had sustained intervening injuries after his suspension.

Appellant's then-representative disagreed with the proposed rescission, stating that, by its March 15, 2017 notice, OWCP overstepped its authority in finding the Board in error in its August 11, 2016 decision. Dr. Salerno submitted reports dated March 6 and April 3, 2017 reiterating his findings and conclusions.

By decision dated April 28, 2017, OWCP finalized the rescission of its acceptance of the September 20, 2006 recurrence of disability. It noted that appellant had not responded to its February 10, 2017 development questionnaire. OWCP concluded that the medical evidence of record did not establish that the September 20, 2006 recurrence of disability was causally related to the accepted January 3, 1996 employment injury.

By a separate April 28, 2017 decision, OWCP found that the medical evidence of record was of insufficient rationale to establish that appellant sustained a recurrence of disability on April 8, 2002.

By decision dated May 1, 2017, OWCP found that the medical evidence of record was insufficiently rationalized to establish that appellant sustained a recurrence of disability on September 20, 2006.

### **LEGAL PRECEDENT -- ISSUE 1& 3**

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."<sup>17</sup> An individual person who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and

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<sup>17</sup> 20 C.F.R. § 10.5(x); R.S., 58 ECAB 362 (2007).

supports that conclusion with sound medical reasoning.<sup>18</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>19</sup>

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

The Board finds that appellant has not established a recurrence of disability on April 8, 2002. The record does not contain medical opinion evidence, based upon a complete and accurate history to support that he sustained a spontaneous material change in his accepted injury that would prevent him from performing the duties of his regular position he held at the time of the claimed recurrence.<sup>20</sup>

The accepted conditions are lumbosacral strain, displacement of a lumbar intervertebral disc without myelopathy, and other acquired deformities of the ankle and foot, bilateral caused by a January 3, 1996 employment injury. After the work injury, appellant returned to full duty on October 5, 1998. He was suspended by the employing establishment effective April 21, 2002 and terminated for cause effective September 12, 2002, for conduct unbecoming of a National Guard technician and for abuse of government property. Appellant indicated that he worked in sedentary employment for several months in 2002, but provided no specific information regarding this employment. He was incarcerated from November 17, 2003 until September 5, 2006 for a felony conviction unrelated to his compensation claim.

The medical evidence relevant to the claimed April 8, 2002 recurrence of disability, includes reports from Dr. Diamond, an attending physician. On March 20, 2002 Dr. Diamond noted that appellant had known lumbar disc disease and, although working, was having some difficulty. An April 10, 2002 progress note reported an onset of severe low back pain the previous day which radiated to the left leg and caused him to fall. Exacerbation of degenerative disc disease with known left foot drop and fall, and L5 radicular symptoms on the left were diagnosed. A handwritten note related that appellant fell twice the previous day due to his back with tingling and numbness radiating into the left leg. It indicated that he would be kept out of work from April 10 to May 13, 2002. A May 21, 2002 treatment note indicated that appellant was very stressed because he was out of work without pay. Straight leg raise was positive and Dr. Diamond diagnosed chronic L5 radiculopathy and left foot drop. On April 10, 2003 Dr. Diamond noted findings and advised that appellant was under increasing stress and had radicular symptoms in both legs. There are no additional medical reports prior to appellant's incarceration on November 17, 2003.

While Dr. Diamond noted on March 20, 2002, before the claimed recurrence, that appellant was working with difficulty, and on April 10, 2002 advised that he should not work through May 13, 2002, his reports included no explanation of how the January 3, 1996 work injury caused his disability and he expressed no knowledge of his specific job duties. It is unclear under what circumstances appellant's claimed falls on April 9, 2002 occurred, and there is no evidence of

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<sup>18</sup> S.S., 59 ECAB 315 (2008).

<sup>19</sup> See *Ronald C. Hand*, 49 ECAB 113 (1997).

<sup>20</sup> See *D.G.*, Docket No. 16-0216 (issued July 7, 2016).

record to support an April 8, 2002 recurrence of disability, as claimed by appellant. Dr. Diamond also did not mention appellant's part-time employment in 2002.

The Board has long held that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value.<sup>21</sup> An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury.<sup>22</sup> Appellant did not submit sufficient evidence to show that the claimed April 8, 2002 recurrence and disability were causally related to the January 3, 1996 employment injury.<sup>23</sup>

Lastly, the Board notes that, if a claimant is imprisoned based on a felony conviction unrelated to FECA claim, section 8148(b) of FECA requires suspension of benefits to the claimant.<sup>24</sup> While payment of benefits to eligible dependents during the time that the claimant is imprisoned, is allowed,<sup>25</sup> there is no probative evidence of record covering the period of appellant's incarceration that would establish total disability due to the January 3, 1996 employment injury. The medical reports completed during his incarceration were completed by nurses and nurse practitioners who do not qualify as physicians under FECA.<sup>26</sup>

Thus, appellant has failed to meet his burden of proof to establish a recurrence of disability on April 8, 2002 and September 20, 2006.

### **LEGAL PRECEDENT -- ISSUE 2**

Pursuant to section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.<sup>27</sup> The Board has upheld OWCP's authority under this section to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>28</sup> The Board has noted, however, that the power to annul an award is not arbitrary and

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<sup>21</sup> *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>22</sup> *Supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> 5 U.S.C. § 8148(b).

<sup>25</sup> *Id.*

<sup>26</sup> Registered nurses, nurse practitioners, and physician assistants are not "physicians" as defined under FECA. Their opinions are of no probative value. *See Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>27</sup> 5 U.S.C. § 8128.

<sup>28</sup> *See John W. Graves*, 52 ECAB 160 (2000); 20 C.F.R. § 10.610.

that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>29</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation employing establishment and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.<sup>30</sup>

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument, and/or rationale.<sup>31</sup> Probative and substantial positive evidence<sup>32</sup> or sufficient legal argument<sup>33</sup> must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.<sup>34</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for a September 20, 2006 recurrence of disability as the evidence of record demonstrated that OWCP's acceptance was in error.<sup>35</sup>

At the time OWCP accepted the recurrence of disability on June 15, 2011, it found that the medical evidence submitted was sufficient to establish that appellant was totally disabled from work during his incarceration and that the September 20, 2006 injury did not break the chain of causation because it would not have occurred had he not previously suffered the January 3, 1996 employment injury. In its April 28, 2017 decision, it finalized its rescission of acceptance of the September 20, 2006 recurrence of disability. OWCP noted that appellant had not responded to its February 10, 2017 questionnaire and concluded that the medical evidence did not explain why he could work full duty for four years and suddenly, when suspended, could no longer perform his job duties due to lumbar disc disease. It also noted that the record supported that he had worked in private employment and had sustained intervening injuries after his suspension. OWCP concluded that the evidence of record did not establish that the September 20, 2006 recurrence of disability was causally related to the accepted January 3, 1996 employment injury.

As noted, appellant was incarcerated from November 17, 2003 until September 5, 2006. The record contains no report from a physician during this period.<sup>36</sup> Appellant claimed that the

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<sup>29</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>30</sup> *See V.C.*, 59 ECAB 137 (2007).

<sup>31</sup> *See John W. Graves*, *supra* note 28.

<sup>32</sup> *See Michael W. Hicks*, 50 ECAB 325 (1999).

<sup>33</sup> *See e.g., Beth A. Quimby*, 41 ECAB 683 (1990).

<sup>34</sup> *See S.R.*, Docket No. 09-2332 (issued August 16, 2010).

<sup>35</sup> *See L.M.*, Docket No. 16-1539 (issued April 3, 2017).

<sup>36</sup> *Supra* note 26.

September 20, 2006 recurrence occurred while playing with his grandchildren when he felt a sharp low back pain and loss of strength in his low back and left leg, which caused him to fall. He also indicated that he had never fully recovered from the January 3, 1996 employment injury.

The Board finds that the medical evidence of record is insufficient to establish that appellant was totally disabled during incarceration and that the September 20, 2006 incident was sufficient to break the chain of causation. To support a recurrence of disability, there must be probative medical evidence.<sup>37</sup>

The medical evidence regarding the claimed September 20, 2006 recurrence of disability and OWCP's rescission of acceptance of that claim includes a July 10, 2007 report in which Dr. Genovese did not discuss a cause of appellant's diagnosed low back condition. Likewise, the diagnostic studies, including a November 1, 2007 EMG/NCV, and January 4, 2013 and October 20, 2015 MRI scans of the lumbar spine did not discuss causal relationship. The Board has long held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>38</sup> Dr. Scott who performed a second-opinion evaluation in January 2017 did not comment on whether appellant sustained a recurrence of disability on September 20, 2006.

Dr. Diamond submitted reports beginning in September 25, 2006. In that report, he did not mention an incident that occurred on September 20, 2006. In additional reports, Dr. Diamond advised that appellant had been totally disabled since April 2002, but the physician did not explain how the 1996 employment injury caused the disability, especially since appellant had been working full duty at the time he was terminated by the employing establishment. He did not exhibit knowledge of appellant's private employment, his incarceration, or discuss the September 20, 2006 incident. Dr. Diamond merely indicated that appellant's work-related lumbar disc disease had deteriorated over time.

Dr. Salerno began pain management on August 27, 2007. He reported that appellant had been unemployed due to his back condition and it was clear that he could not return to his previous employment, Dr. Salerno did not indicate knowledge of appellant's dismissal for cause, subsequent incarceration, additional outside employment, or the September 20, 2006 incident. On April 21, 2011 he advised that appellant was status post a January 3, 1996 employment injury and had progressive worsening over the last several years with symptoms consistent with lumbar facet dysfunction and degenerative disc disease. Dr. Salerno opined that appellant was unable to return to the aircraft mechanic position due to its bending, twisting, and lifting requirements, but that appellant was capable of performing a full-time sedentary job. He also noted that lower extremity EMG/NCV studies suggested active lumbar spinal radiculopathy. Dr. Salerno, however, did not provide any explanation linking the radiculopathy to the January 3, 1996 employment injury. On January 9, 2017 he noted appellant's continued complaint of ongoing radiating low back pain and noted findings. Dr. Salerno diagnosed other intervertebral disc degeneration, lumbosacral region, postlaminectomy syndrome, not elsewhere classified, muscle spasm of back, and spinal

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<sup>37</sup> An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. *Ronald C. Hand, supra* note 19.

<sup>38</sup> *Willie M. Miller, 53 ECAB 697 (2002).*

enthesopathy, lumbar region. In his last report dated April 3, 2017, Dr. Salerno reiterated his findings and conclusions.

In assessing medical evidence, the weight of a physician's opinion is determined by the opportunity for and thoroughness of the examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale used to explain the conclusions reached.<sup>39</sup>

The Board finds that OWCP properly explained that the medical evidence presented did not establish a spontaneous change in the accepted condition and that there was no probative medical evidence establishing a recurrence of disability on September 20, 2006 causally related to the accepted January 3, 1996 employment injury. OWCP therefore presented sufficient justification to rescind acceptance of appellant's claim.<sup>40</sup>

### **ANALYSIS -- ISSUE 3**

As noted, *infra*, OWCP met its burden of proof to rescind its acceptance of the claimed September 20, 2006 recurrence. For the reasons stated in that analysis, appellant also did not meet his burden of proof to establish a recurrence of disability on September 20, 2006.<sup>41</sup> He did not present reasoned medical evidence showing that his claimed recurrence beginning September 20, 2006 was caused by a spontaneous change in his accepted conditions.

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 appellant failed to meet his burden of proof to establish a recurrence of total disability on April 8, 2002 caused by the accepted January 3, 1996 employment conditions. The Board further finds that OWCP met its burden of proof to rescind acceptance of a September 20, 2006 recurrence, and that appellant failed to meet his burden of proof to establish a recurrence of total disability on September 20, 2006.

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<sup>39</sup> *L.G.*, Docket No. 09-1692 (issued August 11, 2010).

<sup>40</sup> *See C.P.*, Docket No. 17-0549 (issued July 13, 2017).

<sup>41</sup> *Supra* notes 18 and 19.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1 and both April 28, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 23, 2018  
Washington, DC

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

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

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