

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

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**D.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dallas, TX, Employer**

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**Docket No. 17-1535  
Issued: February 12, 2018**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 6, 2017 appellant filed a timely appeal from a May 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 met its burden of proof to rescind its acceptance of appellant's claim for lumbar disc displacement and radiculopathy.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 10, 2015 appellant, then a 35-year-old city carrier assistant, filed an occupational disease claim (Form CA-2) alleging that he sustained an occupational disease of his low back due to the performance of his work duties over a period of time. He asserted that his job required him to lift mail packages weighing up to 20 pounds, constantly step in and out of his postal vehicle, walk for long distances, and engage in bending and twisting. Appellant indicated that on February 24, 2014 he first became aware of his claimed condition and that it was caused or aggravated by factors of his federal employment.

On the reverse of his claim form, E.C., a supervisor of customer services, indicated that appellant last worked for the employing establishment on April 25, 2014.<sup>3</sup> He noted his understanding that appellant stopped work due to an off-duty vehicular accident and advised that the employing establishment was controverting the occupational disease claim.

In a December 9, 2015 report, Dr. Ronnie B. Shade, an attending Board-certified orthopedic surgeon, indicated that appellant presented complaining of a low back injury on February 24, 2014. He noted that appellant had reported that he had been employed as a city carrier assistant for a total of one year and 10 months and that his day-to-day job duties included prolonged walking/standing, carrying mail and packages weighing up to 15 pounds with a mail carrier bag, bending, stooping, climbing stairs, lifting, sorting, and casing and delivering mail for 8 to 12 hours per day for 5 to 6 days per week. Appellant reported to Dr. Shade that, while performing his regular job duties as a city carrier assistant, he felt an onset of pain and popping into his lower back. Appellant's initial back and right leg complaints dated to 2008 and he underwent a series of lumbar epidural injections at that time. He further reported that in 2013 he underwent a left "lumbar biopsy" for suspected infection at which time he experienced the onset of left leg pain and weakness, and that on May 26, 2015 he underwent lumbar disc fusion surgery by Dr. Henrik Mike-Mayer, an attending Board-certified orthopedic surgeon.

With respect to his low back, the medical notes document that appellant complained of moderate-to-severe pain, cramps, stiffness, and muscle spasms and, with respect to his lower extremities, he complained of pain, numbness, tingling sensation, cramps, weakness, give way sensation, and stiffness.<sup>4</sup>

Dr. Shade reported the findings of the physical examination he conducted on December 9, 2015. He noted that bilateral iliolumbar tenderness and spasm were present and there was loss of normal lumbar lordosis. The motor examination revealed 4/5 weakness of the lower extremities and the sensory examination in the right lower extremity revealed decreased sensation in the right L5 nerve distribution and in the left L4 and S1 nerve distributions.

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<sup>3</sup> E.C. indicated that he was not appellant's immediate supervisor when he stopped work in March 2014.

<sup>4</sup> Dr. Shade discussed the discectomy and fusion surgery at L5-S1 that appellant underwent on May 26, 2015. He noted that an April 21, 2015 magnetic resonance imaging (MRI) scan of appellant's low back had contained an impression of broad-based far right paracentral/posterolateral disc osteophyte complex at the L5-S1 level which resulted in right subarticular recess narrowing, and cortical endplate edema enhancement at the L5-S1 level most consistent with degenerative changes.

Dr. Shade diagnosed other intervertebral disc displacement of the lumbar region, radiculopathy of the lumbar region, chronic pain syndrome, obesity (unspecified), and bilateral flat foot (pes planus). He again noted appellant's history of one year and ten months in the postal position and then posited that the mechanism of injury was directly causally related to the injury that appellant sustained on February 24, 2014. Dr. Shade noted that it was his medical opinion that the injuries to appellant's lower back were caused by performing his day-to-day regular job duties as a city carrier assistant which included prolonged walking, prolonged standing, carrying mail and packages up to 15 pounds with a mail carrier bag, bending, stooping, climbing stairs, lifting, sorting, and casing and delivering mail for 8 to 12 hours a day for 5 to 6 days a week. He noted, "Again, it is my strong opinion that the injury, which this patient has sustained to the lower back, is directly causally related to his injury on [February 24, 2014]."

On April 15, 2016 appellant wrote to his United States Senator noting that he had been employed "with the Postal Service since 2014" when he commenced his employment in a non-career position. He noted that he was "in training in February 2014" when he sustained a work injury. Appellant explained his course of medical treatment and discussed his complaint on file with the Equal Employment Opportunity Commission. He also noted his filing for disability from the Social Security Administration.

On May 26, 2016 OWCP accepted appellant's claim for lumbar disc displacement and radiculopathy.

The record contains a May 25, 2016 letter to appellant's Senator in which an employing establishment official refuted parts of his April 15, 2016 correspondence. She summarized time records showing only 16 intermittent days of employment, between February 10 and April 25, 2014, that appellant worked in 2014.<sup>5</sup> The employing establishment official noted the specific hours which appellant had worked between the commencement of his employment and his final day of performance of work duties on April 25, 2014 when he worked 6.5 hours. She also alleged facts relating to whether appellant fell into a hole and whether his personal vehicle had been in an accident while he was in the performance of duty.

On June 3, 2016 OWCP received an undated letter in which the employing establishment controverted appellant's occupational disease claim. The employing establishment official indicated that appellant had used his private vehicle to perform his work duties and it had been damaged that day, but appellant was not in the vehicle. The official noted that appellant only worked 16 days in 2014<sup>6</sup> and that he gave varying accounts of how he was injured.

In a June 8, 2016 letter, OWCP advised appellant that it proposed to rescind its acceptance of his claim for lumbar disc displacement and radiculopathy. It noted that the medical evidence of record did not support the acceptance of these conditions. OWCP indicated that Dr. Shade's December 9, 2015 report, the ostensible basis for the acceptance of appellant's

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<sup>5</sup> The correspondence noted that appellant's employment with the employing establishment was effective beginning February 8, 2014 but he did not work his first day until February 10, 2014.

<sup>6</sup> The official noted that, despite not having worked since April 25, 2014, appellant was still an employee of the employing establishment at the time he filed his occupational disease claim in December 2015.

claim, was not based on a complete and accurate factual history as Dr. Shade was under the impression that appellant worked for more than 16 days in 2014. It also noted that Dr. Shade's December 9, 2015 report contained inconsistencies because it suggested other possible work factors such as stepping into a hole. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed rescission action.<sup>7</sup>

In response to the notice of proposed rescission, appellant submitted a copy of the December 9, 2015 report of Dr. Shade, which had already been submitted to OWCP. He also submitted a report of the May 26, 2015 lumbar disc fusion surgery performed by Dr. Mike-Mayer.

By decision dated August 12, 2016, OWCP rescinded the acceptance of appellant's claim for lumbar disc displacement and radiculopathy. It found that the rescission was justified because appellant had not established fact of injury because the evidence of record did not support that the injury occurred as alleged. OWCP noted that appellant did not complete and return the questionnaire it provided on June 8, 2016.

Appellant submitted a November 17, 2016 report in which Dr. Daniel D. Lee, an attending Board-certified orthopedic surgeon, provided examination findings and diagnosed right hip joint pain and herniated lumbar disc with radiculopathy.

Appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on April 12, 2017, counsel argued that OWCP had no basis to rescind its acceptance of appellant's claim for lumbar disc displacement and radiculopathy.

By decision dated May 19, 2017, an OWCP hearing representative affirmed OWCP's August 12, 2016 decision rescinding the acceptance of appellant's claim for lumbar disc displacement and radiculopathy. She noted that there was no contemporaneous evidence of appellant experiencing an employment incident at work on February 8, 2014 as later alleged, *i.e.*, stepping into a hole and falling. The hearing representative noted that the medical evidence of record did not support acceptance of appellant's claim for lumbar disc displacement and radiculopathy. She indicated that the reports of appellant's attending physicians were not based on complete and accurate factual histories because they either diagnosed conditions due to a non-established employment incident (stepping into a hole on February 24, 2014) or due to being exposed to work duties over an extended period (despite the fact that appellant only worked 16 days in 2014).

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<sup>7</sup> In a June 8, 2016 letter, OWCP requested that appellant complete and return a questionnaire which posed various questions regarding the work activities which he believed contributed to his medical condition. In another June 8, 2016 letter, the employing establishment also requested additional information from the employing establishment.

## 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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. It is well established that once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP 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>11</sup>

## ANALYSIS

Appellant filed an occupational disease claim alleging an occupational disease of his low back due to the performance of his work duties over a period of time. He asserted that his job required him to lift mail packages weighing up to 20 pounds, constantly step in and out of his postal vehicle, walk for long distances, and engage in bending and twisting. Appellant indicated that he first became aware of his claimed condition on February 24, 2014 and first realized on the same date that it was caused or aggravated by factors of his federal employment. He later noted that he had stepped in a hole at work on February 24, 2014 as causing his claimed work injuries. On May 26, 2016 OWCP accepted appellant's claim for lumbar disc displacement and radiculopathy, but it later rescinded its acceptance of these medical conditions.

The Board finds that OWCP has met its burden of proof to rescind its acceptance of appellant's claim for lumbar disc displacement and radiculopathy. The acceptance of appellant's claim was based upon the medical reports of Dr. Shade. In those medical notes he specifically discussed appellant's work history in his employment position as lasting "one year and ten months" prior to the development of the occupational disease claim. However, this history of injury is not supported by the evidence of record.<sup>12</sup> Specifically, the employing establishment

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<sup>8</sup> 5 U.S.C. § 8128.

<sup>9</sup> *John W. Graves*, 52 ECAB 160, 161 (2000).

<sup>10</sup> *See* 20 C.F.R. § 10.610.

<sup>11</sup> *See John W. Graves, supra* note 9.

<sup>12</sup> Within the August 12, 2016 and May 19, 2017 decisions OWCP also found that there was no contemporaneous evidence of appellant experiencing an employment incident at work on February 8, 2014 as later alleged, *i.e.*, stepping into a hole and falling. OWCP also noted that the medical evidence did not support acceptance of appellant's claim for lumbar disc displacement and radiculopathy.

expressly noted the dates of appellant's commencement of employment, his intermittent and sporadic work over a period of 16 days, and the last date of his employment. Appellant confirmed his limited time in his position prior to his alleged injury within the letter he wrote to his Senator. Therefore, the reports of appellant's attending physicians were not based on complete and accurate factual histories because they noted and were premised upon exposure to work duties over an extended period of time, despite the fact that appellant only worked intermittently for 16 days in 2014.<sup>13</sup> The Board finds that Dr. Shade's medical reports are insufficient to support acceptance of a claim and, as such, OWCP met its burden of proof to rescind acceptance of appellant's claim for lumbar disc displacement and radiculopathy.

On appeal counsel argues that OWCP did not justify its rescission of the acceptance of appellant's claim for lumbar disc displacement and radiculopathy because it did not submit "new" and "different" evidence to support its action. However, he did not present support for applying such a standard. As noted above, OWCP has the obligation to provide a clear explanation of the rationale for rescission and it met its obligation in the present case for the reasons explained above.<sup>14</sup>

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 has met its burden of proof to rescind its acceptance of appellant's claim for lumbar disc displacement and radiculopathy.

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<sup>13</sup> OWCP had indicated that Dr. Shade's December 9, 2015 report, the ostensible basis for the acceptance of appellant's claim, was not based on a complete and accurate factual history as Dr. Shade was under the impression that appellant worked for more than 16 days in 2014.

<sup>14</sup> See *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2018  
Washington, DC

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

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

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