

ISSUE

The issue is whether OWCP has met its burden of proof to rescind its acceptance of appellant's recurrence of disability.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 12, 2002 appellant, then a 45-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained left arm, left hand, left shoulder, neck, back, bilateral knee and leg, and right ankle injuries as a result of motor vehicle accident while in the performance of duty. OWCP accepted the claim for cervical strain, lumbosacral strain, dorsal strain, contusion of the left forearm, and left shoulder sprain.

Appellant returned to limited-duty work on August 2, 2002. On March 6, 2007 OWCP accepted the claim for recurrence of disability commencing January 22, 2007. On April 1, 2009 appellant returned to a modified position, but only worked 45 minutes.⁵

In a medical report dated June 10, 2009, Dr. Barry S. Gleimer, a Board-certified orthopedic surgeon, noted that appellant reported that she had attempted to return to work on April 1, 2009, but that she could only work 45 minutes due to increasing neck and back pain and with upper extremity paresthesias and radiation. He discussed findings on physical examination and assessments of cervical and lumbar strain/sprain, cervical radiculopathy, and disc herniation at C6-7, bulging lumbar disc at L5-S1, herniated lumbar disc at L4-5, impingement of the bilateral shoulders with contraction, probable adhesive capsulitis left shoulder, and bilateral carpal tunnel syndrome. Dr. Gleimer opined that appellant was unable to be actively employed in any capacity at the employing establishment at that time and that she had reached maximum medical improvement. He further opined that she was permanently disabled.

Dr. Steven H. Ressler, an attending anesthesiologist specializing in pain medicine, noted in a report dated May 18, 2009, the history of appellant's June 12, 2002 employment injuries and reviewed her medical records. He summarized that she had ongoing complaints of neck and low back pain attributable to her accepted employment-related conditions. Dr. Ressler noted that appellant had been unable to work at the employing establishment due to pain, spasms, weakness, and soreness in her neck and low back. He advised that she could perform a limited-duty position offered to her by the employing establishment on January 28, 2009. Dr. Ressler concluded that the duties of this position were well within appellant's physical limitations. He recommended that she rest as needed during the workday.

⁴ Docket No. 16-1464 (issued November 1, 2017).

⁵ By decision dated June 15, 2009, OWCP denied appellant's claim for a recurrence of disability commencing April 1, 2009. Its payment records indicated that she had received a combination of wage-loss and schedule award compensation from January 19, 2004 to May 28, 2010. Appellant was separated from the employing establishment effective April 6, 2012 due to her inability to perform her work duties.

OWCP received follow-up assessment reports and other reports dated July 28, 2009 through March 25, 2015 from Dr. Ressler. Dr. Ressler diagnosed cervical/lumbar facet disc disease with left lower extremity radiculopathy, bilateral carpal tunnel syndrome, left sacroiliac joint disease, cervical and lumbar spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, brachial neuritis or radiculitis not otherwise specified, and thoracic or lumbosacral neuritis or radiculitis unspecified, long-term (current) use of "OTH," and encounter for therapeutic drug. In office procedure notes dated May 21 and August 12, 2014, he reiterated his prior diagnosis of lumbar disc displacement. Dr. Ressler also diagnosed lumbar radiculopathy secondary to herniated disc and lumbosacral neuritis, unspecified. He performed lumbar transforaminal epidural steroid injections at the left L5 and left L5-S1 levels.

In a report dated November 1, 2011, Dr. Philip Tasca, a Board-certified physiatrist, examined appellant and provided assessments of chronic low back pain and chronic cervical degenerative disc disease. He reexamined appellant on December 18, 2012 and diagnosed cervical and lumbar spondylosis with radiculopathy.

A patient work status report dated May 24, 2012 by Dr. John M. Diveris, a Board-certified orthopedic surgeon, noted his examination of appellant's left shoulder. Dr. Diveris diagnosed joint pain of the shoulder region, sprains and strains of the shoulder and upper arm, other specified sites of the shoulder and upper arm, late effect of tendon injury, disorders of bursae and tendons in the shoulder region, unspecified, and articular cartilage disorder, shoulder region. He advised that appellant could return to work with restrictions.

In reports dated March 18, 2013, September 24 and November 12, 2014, and February 4, 2015, Erica M. Voorhees, a certified physician assistant, provided impressions of cervical and lumbar disc facet disease, bilateral carpal tunnel syndrome, cervical and lumbar spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, brachial neuritis or radiculitis not otherwise specified, and thoracic or lumbosacral neuritis or radiculitis unspecified, long-term (current) use of OTH, and encounter for therapeutic drug.

Dr. Andrew H. Shaer, a Board-certified diagnostic radiologist, noted in a July 30, 2013 report that a lumbar spine magnetic resonance imaging (MRI) scan revealed interim left foraminal narrowing at L5-S1 and a pelvic cyst, likely arising from the left adnexa.

On April 9, 2015 appellant filed a notice of recurrence (Form CA-2a) claiming disability commencing May 18, 2009.

By decision dated April 17, 2015, OWCP accepted the recurrence of disability based on Dr. Ressler's May 18, 2009 report.

In report dated April 13, 2015, Dr. Ressler performed an additional lumbar transforaminal steroid epidural injection.

On May 1, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay for the period May 18, 2009 to May 1, 2015.

In reports dated May 13 and July 15, 2015, Dr. Ressler continued to diagnose cervical and lumbar spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, brachial neuritis or radiculitis not otherwise specified, and thoracic or lumbosacral neuritis or radiculitis unspecified, long-term (current) use of "OTH," and encounter for therapeutic drug.

Ms. Voorhees, in a report dated June 22, 2015, also continued to diagnose cervical and lumbar spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, degeneration of lumbar or lumbosacral intervertebral disc, brachial neuritis or radiculitis not otherwise specified, and thoracic or lumbosacral neuritis or radiculitis unspecified, long-term (current) use of "OTH," and encounter for therapeutic drug.

By decision dated July 20, 2015, OWCP denied appellant's claim for disability for the period May 18, 2009 to May 1, 2015, finding that the medical evidence of record did not contain a rationalized medical opinion to establish that she was totally disabled for work during the claimed period.

On July 28, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Additional reports dated August 21 and November 11, 2015 from Dr. Ressler and September 15 and December 2, 2015 from Ms. Voorhees reiterated their prior cervical and lumbar diagnoses. In an additional office procedure note dated October 12, 2015, Dr. Ressler performed lumbar medial branch nerve blocks at the left L2, L3, L4, and L5 levels to treat appellant's lumbar disc facet disease and lumbar spondylosis.

An OWCP hearing representative, by decision dated January 19, 2016, affirmed the July 20, 2015 decision. He found that the medical evidence of record was insufficient to establish a recurrence of disability commencing May 18, 2009. The hearing representative noted that "Although [OWCP] notified the claimant, by letter dated April 17, 2015, that the claim for recurrence for the period in question was accepted, there is no evidence to reflect the payment of any disability compensation pursuant thereto and [OWCP] upon further review may alter its position regarding the acceptance of a claim."

Appellant, through counsel, appealed to the Board on July 7, 2016. By order dated November 1, 2017, the Board set aside the hearing representative's January 19, 2016 decision. The Board found that OWCP was attempting to rescind acceptance of appellant's accepted recurrence of disability without following its established procedures for rescission. The Board remanded the case to OWCP for a proper decision under its procedures with regard to any rescission proposed by OWCP regarding the acceptance of appellant's recurrence of disability.

In reports dated November 9 and December 6, 2017, Susan J. Delancy, a certified physician assistant, provided numerous assessments/diagnoses.

In a report dated January 5, 2018, Dr. Ressler restated his prior wrist, cervical, and lumbar diagnoses. In additional office procedure notes dated December 5, 2016 and January 30, 2018, he performed lumbar medial branch nerve blocks and a lumbar epidural steroid injections.

In a letter dated February 26, 2018, OWCP advised appellant that it proposed to rescind its April 17, 2015 acceptance of her claim for a recurrence of disability commencing May 18, 2009, concluding that the medical evidence of record was insufficient to establish that she had been totally disabled from work due to a worsening of her accepted employment injury.

In a reports dated February 28 and March 22, 2018, Ms. Delaney reiterated her prior diagnoses.

In a letter dated March 6, 2018, counsel asserted that OWCP had not met its burden of proof to rescind acceptance of the recurrence of disability as it had not explained the error made in its acceptance of appellant's recurrence claim.

In an April 23, 2018 report, Dr. Ressler reiterated his prior wrist, cervical, and lumbar diagnoses.

OWCP, by decision dated May 2, 2018, finalized the rescission of its April 17, 2015 acceptance of appellant's recurrence of disability finding that the medical evidence submitted was insufficient to establish an employment-related recurrence of disability on May 18, 2009.

Dr. Laura E. Ross, a Board-certified orthopedic surgeon, in an April 20, 2018 report, noted a history of the June 12, 2002 employment injuries and discussed findings on physical examination, providing an impression of internal derangement of both knees.

On May 10, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

An additional office procedure note dated May 14, 2018 from Dr. Ressler indicated that he performed a lumbar transforaminal epidural steroid injection at the left L5 level to treat appellant's diagnosed lumbar radiculopathy secondary to herniated disc. In a May 31, 2018 report, Dr. Ressler continued to restate his prior wrist, cervical, and lumbar diagnoses.

Appellant submitted an attending physician's report (Form CA-20) dated May 21, 2018 from Dr. Ressler in which he diagnosed cervical/lumbar disc herniation with left lower extremity radiculopathy. Dr. Ressler checked a box marked "yes" indicating that the diagnosed condition was caused or aggravated by an employment activity. He explained that the injury occurred while appellant was on duty at the employing establishment. Dr. Ressler indicated that she was totally disabled beginning May 2009.

Dr. Ross, in reports dated June 29 and August 24, 2018, noted a history of work-related bilateral knee injuries on June 12, 2002. She provided physical examination findings, reviewed diagnostic test results, and provided an assessment of post-traumatic exacerbation of degenerative joint disease of the bilateral knees.

Dr. Ressler, in reports dated July 23, August 16, and September 13, 2018, continued to restate his prior diagnoses. In an October 9, 2018 office procedure note, he noted that he performed a lumbar epidural steroid injection.

By decision dated November 14, 2018, an OWCP hearing representative affirmed the May 2, 2018 rescission finding that the medical evidence of record was insufficient to support disability commencing May 18, 2009 due to her accepted June 12, 2002 employment injuries.

LEGAL PRECEDENT

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.⁶ 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.⁷ The Board has noted, however, that the power to annul an award is not arbitrary and that 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 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.⁹

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument, and/or rationale.¹⁰ Probative and substantial positive evidence¹¹ or sufficient legal argument¹² must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹³

ANALYSIS

The Board finds that OWCP has met its burden of proof to rescind its acceptance of appellant's recurrence of disability.

The acceptance of appellant's recurrence was based upon the May 18, 2009 medical report of Dr. Ressler, an attending physician. In that report, Dr. Ressler noted that appellant had ongoing complaints of neck and low back pain related to the accepted June 12, 2002 employment-related injuries. He opined, however, that she could perform the limited-duty position offered to her by the employing establishment on January 28, 2009. Dr. Ressler recommended that she rest as needed during the workday. He explained that the duties of the offered position were well within appellant's physical limitations. Dr. Ressler's report does not contain a rationalized medical

⁶ 5 U.S.C. § 8128.

⁷ See *John W. Graves*, 52 ECAB 160 (2000); 20 C.F.R. § 10.610.

⁸ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁹ See *V.C.*, 59 ECAB 137 (2007).

¹⁰ See *John W. Graves*, *supra* note 7.

¹¹ See *Michael W. Hicks*, 50 ECAB 325 (1999).

¹² See *e.g.*, *Beth A. Quimby*, 41 ECAB 683 (1990).

¹³ See *S.R.*, Docket No. 09-2332 (issued August 16, 2010).

opinion that appellant had work-related disability commencing May 18, 2009. Thus, the Board finds that OWCP has met its burden of proof to rescind acceptance of the recurrence.¹⁴

On appeal counsel contends that the medical evidence establishes that appellant could not perform the position she returned to on April 1, 2009. For the reasons set forth above, the Board finds that OWCP has met its burden of proof to rescind acceptance of appellant's recurrence of disability.

CONCLUSION

The Board finds that OWCP has met its burden of proof to rescind its acceptance of appellant's recurrence of disability.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2019
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

¹⁴ See *C.P.*, Docket No. 17-0549 (issued July 13, 2017).

¹⁵ The Board notes that subsequent to the rescission appellant submitted medical evidence which has yet to be considered by OWCP as to entitlement to additional wage-loss compensation benefits. As this evidence has not been reviewed by OWCP the issue of current disability is not presently before the Board. See *e.g.*, *W.H.*, Docket No. 17-1390 (issued April 23, 2018); *see also supra* note 3.