

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

K.E., Appellant)
and) Docket No. 18-1191
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 15, 2020
Vero Beach, FL, Employer)

)

Appearances:

Ronald S. Webster, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 21, 2018 appellant, through counsel, filed a timely appeal from an April 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 19, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly rescinded acceptance of conditions related to appellant's June 15, 2016 employment injury.

FACTUAL HISTORY

On June 15, 2016 appellant, then a 40-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained a neck strain that day when her mail truck was struck by a car backing out of a residential driveway while in the performance of duty. She stopped work that day.

The employing establishment properly executed an authorization for examination and/or treatment (Form CA-16) on June 15, 2016.

By decision dated December 20, 2016, OWCP accepted appellant's claim for spondylosis without myelopathy or radiculopathy of the cervical region and other spondylosis with myelopathy of the cervical region. It found that causal relationship had been established based on a "November 16, 2016" report in which Dr. Donald Vliegenthart, an orthopedic surgeon, opined that appellant's history, neurologic and physical examination, and objective magnetic resonance imaging (MRI) scan findings in the cervical spine were 100 percent consistent with injury causation being due to a motor vehicle accident that occurred on June 15, 2016.⁴

On January 24, 2017 OWCP referred appellant to Dr. Jeffrey T. O'Brien, a Board-certified orthopedist, for a second opinion evaluation. It provided a statement of accepted facts (SOAF) and a series of questions to Dr. O'Brien asking him to determine the nature and extent of any work-related conditions, and opine whether she was capable of returning to full-duty employment.

In a February 17, 2017 report, Dr. O'Brien discussed appellant's work history and her complaints of postsurgical right shoulder pain, lower back pain, and radiating neck pain. Cervical spine examination demonstrated tenderness on the right with muscle spasms and limited range of motion. The upper extremities showed normal strength and a normal sensory examination. Lumbar spine examination was negative. Dr. O'Brien diagnosed degenerative disc disease of the cervical and lumbar spine and acute postoperative pain of the right shoulder. In answer to OWCP's question as to whether cervical spondylosis was "a result of the one day injury of June 15, 2016," he opined that cervical spondylosis was age-related wear and tear of the spinal discs in the cervical spine, and that the mechanism of injury described, being struck from behind in a vehicle, had not caused degeneration of the spine. Dr. O'Brien indicated that appellant's complaints and physical examination were consistent with his diagnoses, noting that the cervical MRI scan demonstrated a natural process of wear and tear. He advised that there was no evidence of an acute injury to the cervical spine and that objective diagnostic studies revealed a degenerative process. Dr. O'Brien further noted that there was no objective evidence that appellant sustained an injury to her hip and low back. He noted that the history, mechanism of injury and diagnostic studies did not support an acute injury to the right shoulder. Dr. O'Brien advised that appellant had no restrictions as a result of cervical spondylosis, but that she could only work four hours a day with a five-pound

⁴ By decision dated August 3, 2016, OWCP had previously denied appellant's claim.

lifting restriction for eight weeks following her shoulder surgery. In an accompanying work capacity evaluation (Form OWCP-5c) dated February 27, 2017, he repeated his restrictions.

On March 29, 2017 OWCP proposed to rescind its prior acceptance of appellant's claim for spondylosis without myelopathy or radiculopathy of the cervical region and other spondylosis with myelopathy cervical region because it was accepted in error. It explained that a November 16, 2016 report from Dr. Vliegenthart, upon which the claim was accepted, did not exist.⁵ OWCP further found that Dr. Vliegenthart's November 3, 2016 report was insufficient to establish that the one-time traumatic incident caused, contributed to, or aggravated the accepted cervical condition because he failed to provide a full medical history of treatment for a prior condition and failed to pathophysiologically explain how the motor vehicle accident caused or contributed to the diagnosed spondylosis. It noted that this was important because preexisting degenerative disc disease was found on the August 15, 2016 cervical spine MRI scan. OWCP concluded that the second-opinion physician, Dr. O'Brien, provided a definitive medical opinion that invalidated the original acceptance.

On April 5, 2017 appellant, through counsel, disagreed with the proposed rescission of the acceptance of the claim maintaining that the reports of Dr. Anthony J. Lombardo, Board-certified in orthopedic surgery, and Dr. Vliegenthart were sufficient to establish causal relationship and noted that the burden was on OWCP to rescind acceptance. Counsel further asserted that OWCP should have accepted the right shoulder rotator cuff tear and the superior labral anterior to posterior (SLAP) tear and corrective procedure because Dr. Lombardo, Dr. Vliegenthart, and Dr. O'Brien, supported this condition as work related.

By report dated April 18, 2017, Dr. Vliegenthart diagnosed cervicalgia, right shoulder pain, low back pain, herniated disc at C6-7 with cord contact, and foraminal stenosis. He opined that appellant was unable to work.

On April 28, 2017 Dr. James Billys, Board-certified in orthopedic surgery, noted the history of employment injury after which appellant experienced continuing severe axial cervical pain on the right side that radiated into her right arm with numbness and tingling. He described examination findings of joint pain, diminished sensation on the radial and ulnar aspects of her right arm, positive Tinel's sign over the right carpal tunnel, and tenderness over the paracervical region. Dr. Billys diagnosed cervical radiculopathy and recommended an electromyogram and nerve conduction velocity (EMG/NCV) study and a cervical spine MRI scan.

By decision dated May 5, 2017, OWCP finalized the rescission of the acceptance of appellant's claim for spondylosis without myelopathy or radiculopathy cervical region and other spondylosis with myelopathy cervical region, finding that it was erroneously accepted.

On May 12, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

⁵ OWCP referenced a November 16, 2016 report which it indicated was not of record. However, the record contains a November 17, 2016 addendum report by Dr. Vliegenthart, typed at the top and bottom of a November 3, 2016 report.

Additional medical evidence included reports by Casey W. Langel, a physician assistant, who saw appellant for postoperative treatment following her shoulder surgery.

A May 9, 2017 cervical spine MRI scan demonstrated C6-7 central disc herniation with mild effacement of ventral thecal sac and loss of lordotic curvature, possible muscle spasm. A May 19, 2017 EMG/NCV revealed no abnormalities.

In a June 19, 2017 report, Dr. Billys noted that since the June 15, 2016 motor vehicle accident (MVA) appellant had axial cervical pain and cervicogenic. He indicated that examination findings were unchanged from his prior report and diagnosed arthropathy of the cervical spine facet joint. Dr. Billys opined that, based on his review of x-rays and appellant's history, her condition was definitely work related and not related to age or arthritic change.

On June 22, 2017 Dr. Syed Farhan Zaidi, who practices physical medicine and rehabilitation, noted the history of injury and appellant's complaint of severe cervical pain, mainly on the right. He described examination findings, diagnosed cervical radiculopathy, and recommended additional studies.

In a preoperative report dated September 25, 2017, Ms. Langel reported that Dr. Billys would perform cervical surgery the following day.⁶

At the October 16, 2017 hearing, counsel asserted that the medical evidence established that appellant's diagnosed conditions were related to the June 15, 2016 MVA. Appellant testified regarding the employment injury and her medical condition. She reported that Dr. Billys performed cervical spine surgery on September 26, 2017.

OWCP subsequently received reports dated October 23 and November 6, 2017 in which Ms. Langel discussed appellant's cervical condition following surgery.

By decision dated November 30, 2017, an OWCP hearing representative affirmed the decision dated May 5, 2017 rescinding acceptance of spondylosis without myelopathy or radiculopathy cervical region and other spondylosis with myelopathy cervical region. She added that, upon return of the case record, OWCP should render a decision on all other conditions claimed.

On January 23, 2018 appellant, through counsel, requested reconsideration. He referred to Dr. Vliegenthart's November 17, 2016 report and maintained that the medical evidence established that the rescission was in error.

In a report dated January 10, 2018, Dr. Billys noted appellant's complaints of neck and lower back pain. He described physical examination findings and diagnosed neck pain, cervical radiculopathy, low back pain, and bilateral carpal tunnel syndrome.

In a letter of even date, Dr. Billys advised that he had been treating appellant for many months and had reviewed Dr. O'Brien's report. He noted that the impact of the accident had not involved a high speed traumatic event, but maintained that, given a positive MRI scan showing

⁶ A copy of the operative report is not found in the record as transmitted to the Board.

left-sided disc protrusion at C6-7 and the fact that she was reaching her right arm and turning her head to the right when struck, this caused her body to be forced quickly backward, and these forces were consistent with and caused the MRI scan findings, confirmed by his physical examination. Dr. Billys noted that there was no prior history of injury to this area and diagnosed, within a reasonable degree of medical certainty, neck pain, cervicalgia, radiculopathy, directly related to the June 15, 2016 accident. He indicated that appellant's pain and discomfort was likely not from moderate degenerative disc disease, opining that it was from her herniated cervical disc. Dr. Billys reported that, while he was mainly focused on appellant's cervical problems, after reviewing medical evidence from other physicians, including Dr. Vliegenthart, there was also definite causation between the low back and shoulder diagnoses, noting that the mechanism of injury, even with a low speed impact, clearly provided the energy needed to alter appellant's spinal and shoulder anatomy and cause or contribute to these additional diagnoses. He concluded that the surgeries performed on appellant's shoulder and cervical area were reasonable and necessary.

By decision dated April 19, 2018, OWCP denied modification of the November 30, 2017 decision.

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 or her own motion or on application.⁷ 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.⁸ 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.⁹

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. Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.¹⁰

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.¹¹ Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹²

⁷ 5 U.S.C. § 8128.

⁸ See *W.H.*, Docket No. 17-1390 (issued April 23, 2018); 20 C.F.R. § 10.610.

⁹ *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

¹⁰ *V.R.*, Docket No. 18-1179 (issued June 11, 2019).

¹¹ See *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

¹² *W.H.*, *supra* note 8.

ANALYSIS

The Board finds that OWCP has not met its burden of proof to rescind acceptance of conditions related to appellant's June 15, 2016 employment injury.

In support of its rescission of the acceptance of appellant's claim OWCP relied upon the medical opinion of Dr. O'Brien, a second opinion physician. In his February 17, 2017 report, Dr. O'Brien responded to OWCP's question as to whether cervical spondylosis was "a result of the one day injury of June 15, 2016," opining that cervical spondylosis was age-related wear and tear of the spinal discs in the cervical spine, and that the mechanism of injury described, being struck from behind in a vehicle, had not caused degeneration of the spine. He noted that the history, mechanism of injury and diagnostic studies did not support an acute injury to the right shoulder.

The Board finds that the report of Dr. O'Brien was insufficient to establish a basis for the rescission of appellant's claim as his report does not establish that an error had been made in its acceptance. Upon referral of the medical record to Dr. O'Brien, OWCP provided a SOAF dated January 19, 2017. The Board finds that Dr. O'Brien's opinion contradicts the SOAF. The SOAF made clear that OWCP had accepted, as work related, appellant's conditions of spondylosis without myelopathy or radiculopathy of the cervical region and other spondylosis with myelopathy of the cervical region, as a result of his federal employment. OWCP procedures¹³ provide that, when a physician selected by OWCP renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁴ In his report Dr. O'Brien disregarded the accepted conditions noted in the SOAF, and instead opined in response to OWCP's questions that she had not sustained an employment-related injury and instead had age-related conditions. However, OWCP has already accepted that appellant's work-related activities resulted in the accepted conditions contained in the SOAF and that decision was not based upon a factual error or fraud. As such, Dr. O'Brien failed to follow the accepted conditions as set forth in the SOAF and therefore his opinion is insufficient as a basis to rescind the claim.

The Board, therefore, concludes that OWCP has not met its burden of proof to rescind acceptance of appellant's claim, and its rescission of appellant's claim must be reversed.¹⁵

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Case/Disability Management, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11 (September 2010).

¹⁴ D.M., Docket No. 17-1563 (issued January 15, 2019); E.G., Docket No. 12-1011 (issued November 28, 2012).

¹⁵ The Board notes that in the November 30, 2017 decision, an OWCP hearing representative advised OWCP that, upon return of the case record, it should render a decision on all other conditions claimed. The record before the Board does not indicate that OWCP has issued a final decision addressing appellant's additional claimed conditions.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to rescind acceptance of conditions related to appellant's June 15, 2016 employment injury.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 15, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ The Board notes that the employing establishment issued a Form CA-16. A properly executed Form CA-16 may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).