United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 19-0941**
	)	**Issued: April 29, 2020**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Oklahoma City, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 28, 2019 appellant filed a timely appeal from December 3, 2018 and January 23, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[2]

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to rescind its acceptance of the claim; (2) whether OWCP properly determined that appellant received an overpayment of

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the January 23, 2019 decision, OWCP received additional evidence. Appellant also submitted additional evidence on appeal. 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*.

compensation in the amount of $5,498.11 because she received schedule award compensation to which she was not entitled; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 27, 2011 appellant, then a 64-year-old electronic technician, filed an occupational disease claim (Form CA-2) alleging that on October 31, 1995 factors of her federal employment caused a vision condition. She indicated that she had accidentally sprayed her face with electro-contact cleaner that got into her eyes. Appellant noted that she first realized that the condition was causally related to her federal employment on July 12, 2008. She had voluntarily retired on January 1, 2011. In an attached statement, appellant indicated that her work duties from 1988 to 2010 included soldering and inspecting solder joints, which also caused visual problems.

In a development letter dated July 8, 2011, OWCP informed appellant that additional evidence was needed to establish her claim. It asked her to complete a questionnaire by describing employment-related exposure which she believed contributed to her condition. OWCP indicated that to establish her claim she should submit medical evidence that established a diagnosed condition causally related to the alleged factors of employment. In a letter of even date, it also asked the employing establishment to comment on the claim and provide evidence regarding exposure. OWCP afforded 30 days for the submission of this additional evidence.

In statements dated June 27 and August 8, 2011, appellant maintained that soldering at work caused her bad eyesight. She did not submit the requested questionnaire. OWCP received medical evidence which included an employing establishment health record showing that on June 21, 1994, June 19, 1995, and June 26, 1996 appellant was certified for the soldering position by a medical instrument technician. Dr. Selina R. McGee, an optometrist, provided eyeglass prescriptions on July 8, 2009 and August 9, 2010.

The employing establishment responded that appellant performed soldering for many years in the avionics section and she had completed yearly certification for soldering. Appellant's position description was also submitted to the record.

In September 2011, OWCP referred appellant to Dr. Russell D. Crain, a Board-certified ophthalmologist, for a second opinion evaluation. Dr. Crain was asked to make diagnoses for her claimed condition, comment on whether an "incident" of July 12, 2008 had caused her eye condition, and perform an evaluation of permanent impairment. In an October 7, 2011 report, he noted that since appellant had not described a July 12, 2008 incident, he could not answer as to how this incident could be related to her present eye condition. Dr. Crain noted his eye examination findings and diagnosed refractive error, bilateral cataracts, diabetes with no sign of retinopathy, dry eyes, and severe constriction of visual fields. He noted that glasses were necessary due to the refractive error. Dr. Crain also provided an impairment evaluation.

On October 26, 2011 OWCP asked its district medical adviser (DMA) to review Dr. Crain's report and provide an impairment rating. By report dated October 27, 2011, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reported that cataract, not otherwise specified (NOS), had been accepted as caused by a July 12, 2008

employment "incident." He advised that Dr. Crain's impairment evaluation was insufficient and recommended an additional second opinion evaluation.

On November 3, 2011 OWCP accepted the condition of cataract, NOS, bilateral, as work related.

OWCP referred appellant to Dr. Jeffrey T. Shaver, a Board-certified ophthalmologist, on March 8, 2012 for a second opinion examination. It forwarded a statement of accepted facts (SOAF) dated August 26, 2011 to him which identified her accepted claim as an occupational disease. The questions provided to Dr. Shaver, however, requested that he provide an opinion explaining how appellant's present condition was causally related to a July 12, 2008 employment incident. In a March 27, 2012 report, Dr. Shaver diagnosed cataracts. He opined that there seemed to be no relationship between appellant's current medical condition and the July 2008 employment incident. Dr. Shaver indicated that, by present knowledge, cataracts are caused by "inheritance and environmental factors" which were multifactorial without a known specific environmental cause. He advised that there was no evidence in the medical record to indicate that appellant's type of work with soldering had placed her at an increased risk for the development of cataracts, noting that her age and inheritance were enough to explain their development. Dr. Shaver indicated that maximum medical improvement (MMI) would be reached after she had cataract surgery. He concluded that, as there was no evidence of an employment injury to appellant's eyes, he would not recommend an impairment rating.

On September 25, 2012 appellant filed a claim for a schedule award (Form CA-7).

OWCP forwarded Dr. Shaver's report to the DMA on October 9, 2012 for review. In an October 15, 2012 report, the DMA, noted that Dr. Shaver had not provided a rating of impairment due to his other findings. He confirmed that there was no permanent impairment and advised that, given the core issue of causation raised by Dr. Shaver, referral for an impartial evaluation could be necessary.

OWCP unsuccessfully attempted to schedule medical appointments from January 2013 through March 2016. On July 19, 2016 it referred appellant to Dr. John Belardo, Board-certified in ophthalmology. Dr. Belardo was asked to comment on whether she was at MMI and to describe all other pertinent findings including an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In an August 3, 2016 report, Dr. Belardo noted that appellant provided a history that she had gotten solder in her left eye in 2008 and that both eyes had been very irritated, itchy, and watery on a daily basis since that time with blurred distance and near vision. He reported that she had cataract surgery in 2012. Dr. Belardo described his examination findings, diagnosed chronic mild dry eye, and recommended hydration.

[3] A.M.A., *Guides* (6th ed. 2009).

On September 1, 2016 OWCP requested that Dr. Belardo provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*. In a November 1, 2016 report, Dr. Belardo calculated appellant's functional acuity score, finding a final acuity score of 93.

A copy of Dr. Belardo's reports were provided to a DMA, who was asked to opine as to the date of MMI and to prepare a rating of permanent impairment. In a March 22, 2017 report, Dr. Kevin Yuhan, a Board-certified ophthalmologist serving as a DMA, noted appellant's history of bilateral cataracts, including her claim that she got solder in her left eye in 2008, following which her eyes had been very irritated, itchy, and watery, and that both her near and distance vision was blurred. He utilized Dr. Belardo's eye examination findings and calculated her visual acuity in accordance with the A.M.A., *Guides*. The DMA concluded that appellant had four percent visual impairment and advised that she reached MMI after her cataract surgery in 2012. On March 23, 2017 appellant reported that she had cataract surgery on the right eye on August 23, 2012 and on the left eye on September 6, 2012.

By decision dated March 27, 2017, OWCP granted appellant a schedule award for four percent visual impairment. It found that she was at MMI on August 23, 2012 and awarded 6.4 weeks and a fraction of a day compensation. The award ran from October 6 to November 19, 2012.

On April 23, 2017 appellant requested a hearing before an OWCP hearing representative. She submitted an eyeglass prescription dated May 25, 2016 by Dr. Tom Blue, an optometrist.

At the telephonic hearing on September 12, 2017, appellant testified that she got solder in her eye at work while being certified as an electronic technician. She indicated that she filed her claim after she retired, and had cataract surgery, but that she still needed to wear glasses. The hearing representative advised appellant to have Dr. Blue perform a permanent impairment rating. The record was held open for 30 days.

Appellant subsequently submitted a May 25, 2017 report from Dr. Blue in which he diagnosed Type 2 diabetes without complications, bilateral dry eye syndrome, and bilateral punctate keratitis.

By decision dated November 15, 2017, OWCP's hearing representative found that OWCP must further consider appellant's entitlement to compensation. She concluded that the factual evidence of record demonstrated only that appellant was first aware of a problem in July 2008, but had not indicated that appellant had sustained a specific injury other than mentioning getting cleaner in her eye on October 31, 1996. The hearing representative further found that the case record was devoid of medical evidence establishing causal relationship between appellant's employment and her eye conditions. She indicated that neither Dr. Crain nor Dr. Belardo offered an opinion on causal relationship, and that Dr. Shaver unequivocally negated causal relationship. Therefore, the medical evidence of record failed to relate appellant's eye conditions to her employment and the hearing representative remanded the case to OWCP to begin rescission procedures.

On October 22, 2018 OWCP advised appellant that it proposed to rescind its acceptance of her claim for bilateral cataracts.[4] It found the opinion of Dr. Shaver constituted the weight of the medical evidence, noting that the record contained no contrary evidence and concluded that the record contained sufficient evidence to negate any causal relationship between her eye condition and employment. Copies of reports from all OWCP referral physicians and DMA's were attached. Appellant was afforded 30 days to challenge the rescission of her claim.

In correspondence dated November 18, 2018, appellant maintained that her job duties caused eye problems as well as neck and shoulder pain. She submitted a November 1, 1996 traumatic injury claim (Form CA-1) in which she alleged that she accidentally sprayed cleaner into both eyes on October 31, 1996.[5] Appellant submitted employing establishment clinic notes including an October 31, 1996 treatment note in which Dr. David D. Bissell, a pediatric specialist, noted that he flushed her eyes.

By decision dated December 3, 2018, OWCP rescinded acceptance of appellant's claim for bilateral cataracts. It found that upon review of all available evidence, acceptance of her claim should be rescinded because the weight of the medical evidence established that the claimed eye condition was not work related.

On December 21, 2018 OWCP issued a preliminary finding that an overpayment of compensation in the amount of $5,498.11 had been created. It explained that the overpayment occurred because appellant was awarded four percent schedule award compensation for a visual condition that had been rescinded. OWCP found her not at fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20). It informed appellant that, in order for it to consider the question of waiver of recovery of the overpayment or to determine a reasonable method for collection, she must provide a completed OWCP-20, and attach supporting financial documentation, including copies of income tax returns, bank statements, bills, canceled checks, pay slips, and any other record to support claimed income and expenses. OWCP notified her that failure to submit the requested information within 30 days would result in the denial of waiver. An overpayment worksheet and computer payment printout confirmed that appellant was paid $5,498.11 in schedule award compensation.

In response appellant submitted an overpayment action request form in which she requested waiver and an overpayment questionnaire in which she noted monthly income of $4,086.94 and monthly expenses of $6,687.00.

By decision dated January 23, 2019, OWCP finalized the December 21, 2018 preliminary overpayment determination. It found that, as acceptance of appellant claim had been rescinded,

[4] OWCP had previously attempted to rescind acceptance of appellant's claim. By decision dated May 4, 2018, OWCP rescinded acceptance of appellant's claim, finding that the medical evidence of record was insufficient to establish that the accepted eye condition was causally related to her employment. However, no preliminary notice of intent to rescind her claim had been issued. Appellant requested reconsideration on June 4, 2018. By decision dated September 4, 2018, OWCP denied her reconsideration request.

[5] The record before the Board contains no evidence regarding this claim. It is not found in OWCP's electronic data base, the Integrated Federal Employees' Compensation System.

she improperly received schedule award compensation. OWCP further found her not at fault in the creation of the overpayment, but noted that she had not responded to the preliminary determination and, as such, had not established waiver of recovery of the overpayment. It requested repayment in full.

LEGAL PRECEDENT -- ISSUE 1

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.[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 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 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 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.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to rescind acceptance of appellant's claim.

The Board finds the second opinion evaluation of Dr. Shaver, which formed the basis of the rescission was not based on the SOAF, which identified appellant's injury as an occupational disease. The Board has previously explained that OWCP procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion, but does not use the SOAF as the framework in forming his or her opinion, the probative value of the

[6] 5 U.S.C. § 8128.

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

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

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

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

[11] *W.H., supra* note 7.

opinion is seriously diminished or negated altogether.[12] OWCP erroneously requested that Dr. Shaver provide an opinion explaining how appellant's present eye condition was causally related to a July 12, 2008 employment incident, instead of the occupational factors outlined in the SOAF. Dr. Shaver opined that there seemed to be no relationship between her current medical condition and a July 2008 employment incident. However, the record establishes that appellant's occupational disease claim alleged that job duties from 1988 to 2010 caused her eye condition and she consistently noted the progression over time of her visual problems. OWCP procedures provide that, in evaluating medical evidence prior to a termination, its claims examiner (CE) must carefully review the evidence and ensure that the weight of medical evidence is fully rationalized and fully supports the conclusion.[13] The procedures further provide that, when considering rescission, the CE is responsible for carefully and thoroughly evaluating and developing, if necessary, all the evidence in the context of OWCP's burden of proof.[14] As OWCP improperly found the weight of the medical evidence rested with Dr. Shaver, the Board, therefore, concludes that OWCP has not met its burden of proof to rescind acceptance of appellant's claim and its rescission of her claim must be reversed.[15]

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[16] When an overpayment has been made to an individual because of an error of fact or laws, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.[17]

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant had received an overpayment of compensation in the amount of $5,498.11.

The record supports that appellant received a schedule award in the amount of $5,498.11 due to her accepted condition. The overpayment of compensation found by OWCP was based on this schedule award paid to her for the period October 6 to November 19, 2012. As noted above, OWCP has not met its burden of proof to rescind acceptance of appellant's claim.

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *see L.J.*, Docket No. 14-1682 (issued December 11, 2015).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.7 (February 2013).

[14] *Id*. at Chapter 2.1400.19.c.

[15] *See supra* note 10; *D.V.*, Docket No. 16-0849 (issued March 6, 2017), *V.C.*, 59 ECAB 137 (2007).

[16] 5 U.S.C. § 8102(a).

[17] *Id*. at § 8129(a).

The Board thus finds that, as the rescission has been reversed, the overpayment in the amount of $5,498.11, which was based on OWCP's rescission of appellant's claim, must also be reversed.[18]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to rescind acceptance of appellant's claim, and thus, the declared overpayment of compensation in the amount of $5,498.11 that represented a schedule award paid for the period October 6 to November 19, 2012 must also be reversed.[19]

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2019 and December 3, 2018 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: April 29, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[18] *See generally R.W.*, Docket No. 19-1465 (issued January 28, 2020); *K.N.*, Docket No. 11-0540 (issued February 2, 2012).

[19] In light of the Board's disposition of Issue 1 and Issue 2, Issue 3 is rendered moot.