

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

\_\_\_\_\_ )  
D.P., Appellant )  
 )  
and )  
 )  
DEPARTMENT OF VETERANS AFFAIRS, )  
ALBANY STRATTON VETERANS AFFAIRS )  
MEDICAL CENTER, Albany, NY, Employer )  
\_\_\_\_\_ )

**Docket No. 18-1213  
Issued: July 30, 2020**

*Appearances:*  
*Appellant, pro se*  
*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  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On May 29, 2018 appellant filed a timely appeal from a May 1, 2018 merit decision and a May 17, 2018 nonmerit decision 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 OWCP has met its burden of proof to rescind its acceptance of appellant's claim for left knee contusion; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On July 1, 2013 appellant, then a 43-year-old program manager, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2013 he sustained an injury when he slipped on a wet floor and fell on his left knee while in the performance of duty. He did not stop work. On the reverse side of the form, appellant's immediate supervisor checked a box to indicate that appellant had not lost time from work or incurred medical expenses. OWCP did not make a formal determination regarding appellant's traumatic injury claim.

On December 21, 2018 appellant filed a notice of recurrence (Form CA-2a) for medical treatment commencing February 20, 2018 due to his June 28, 2013 injury.

OWCP received a July 1, 2013 report from Dr. Gene R. Pellerin, an osteopath Board-certified in emergency medicine, who noted that appellant reported slipping on a wet floor at work on June 28, 2013 and striking the lateral part of his left knee.<sup>2</sup> Dr. Pellerin indicated that he had not reported a gait disturbance, but complained of pain at the site of impact and behind the knee. He advised that the findings on physical examination of the left knee revealed no bruising, swelling, effusion, or crepitus. Appellant's left knee joint was stable and his gait and stride were normal. Dr. Pellerin diagnosed contusion of the left knee post fall and indicated that the pain behind appellant's left knee could be due to a Baker's cyst rather than an acute injury. He released appellant to full-duty work.<sup>3</sup>

In a July 15, 2013 report, Dr. Pellerin advised that appellant complained of continued lateral left knee pain and reported his belief that the medial part of appellant's left knee was swollen. The findings on physical examination revealed significant crepitus of the left knee at 160 to 180 degrees of extension, but the knee was stable on testing in all directions. Dr. Pellerin diagnosed "effusion left knee post fall."

In a February 20, 2017 report, Dr. Pellerin indicated that appellant presented with left lateral knee pain and intermittent "puffiness" which he reported never resolved after the 2013 employment injury. A February 23, 2018 magnetic resonance imaging (MRI) scan of appellant's left knee contained an impression of Baker's cyst (unchanged) and no significant internal derangement.

By decision dated March 1, 2018, OWCP accepted appellant's claim for left knee contusion. It noted that effusion was not a valid diagnosis, but rather was a symptom.

Appellant subsequently submitted a March 9, 2018 report from Dr. James I. Harding, a Board-certified orthopedic surgeon, who noted that appellant reported an injury to his left knee approximately four years prior when he slipped and fell on a wet floor, striking his left knee on the floor. Dr. Harding indicated that appellant complained of pain over the lateral aspect of appellant's left knee without instability and reported episodes of catching while he was walking. He discussed the findings of a left knee MRI scan and indicated that they were relatively benign

---

<sup>2</sup> The report was prepared by Susan Burkart-Jayez, a nurse practitioner, but was cosigned by Dr. Pellerin.

<sup>3</sup> Dr. Pellerin also released appellant to full-duty work in a note dated July 1, 2013.

with no definitive pathology noted. Dr. Harding diagnosed left knee pain and possible derangement of the lateral meniscus. He opined that the mechanism of appellant's injury was consistent with a lateral meniscus tear, as was the history of catching while walking.

In a March 16, 2018 letter, OWCP advised appellant that it proposed to rescind its prior acceptance of his claim for left knee contusion because the claim was accepted in error. It explained that, in a July 1, 2013 report, a nurse practitioner noted objectively that there was no bruising or swelling of the left knee, yet diagnosed appellant with a left knee contusion. OWCP indicated that, although Dr. Pellerin concurred with the diagnosis, "the objective findings [were] not supportive of the diagnosis provided." It afforded appellant 30 days to submit additional evidence and argument challenging the proposed rescission action.

Appellant subsequently submitted Part B of an Authorization for Examination and/or Treatment (Form CA-16) dated April 27, 2018 in which Dr. Harding noted that appellant reported slipping and falling in 2013 while moving boxes at work. Dr. Harding reported findings of a lateral meniscus tear on MRI scan and an examination consistent with a meniscus tear. He diagnosed lateral meniscus tear of the left knee and he checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by the reported employment activity.

By decision dated May 1, 2018, OWCP finalized the proposed rescission of the acceptance of appellant's claim for left knee contusion. It found that the condition had been erroneously accepted as Dr. Pellerin's July 1, 2013 report did not contain objective findings supportive of the diagnosis of left knee contusion. OWCP indicated that the evidence appellant submitted after receiving its March 16, 2018 notice of proposed rescission did not alter its determination. It concluded that the acceptance of his claim for left knee contusion was "invalidated based on the weight" of Dr. Pellerin's July 1, 2013 report.

On May 10, 2018 appellant requested reconsideration of OWCP's May 1, 2018 decision. In an accompanying statement, he asserted that OWCP had not explained the error in its original March 1, 2018 decision accepting his claim and maintained that the medical reports of record supported the acceptance of his claim. Appellant noted that the employing establishment had not controverted his claim. He submitted a copy of the April 27, 2018 Form CA-16 report from Dr. Harding which he had previously submitted.

By decision dated May 17, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **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 or her own motion or on application.<sup>4</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

---

<sup>4</sup> 5 U.S.C. § 8128.

issue a new decision.<sup>5</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>6</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. 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>7</sup>

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument, and/or rationale.<sup>8</sup> 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.<sup>9</sup>

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

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

On March 1, 2018 OWCP accepted appellant's claim for a June 28, 2013 left knee contusion based on a July 1, 2013 report of Dr. Pellerin. In this report, Dr. Pellerin explicitly diagnosed the condition of left knee contusion post fall. In its March 16, 2018 notice of proposed rescission and May 1, 2018 decision finalizing the rescission action, OWCP expressed its belief that the physical examination findings recorded on July 1, 2013 contradicted the left knee contusion diagnosis provided by Dr. Pellerin on even date.

The Board finds, however, that OWCP did not properly develop the case to clarify the medical evidence prior to finalizing its rescission action. Lacking such development, it did not adequately explain why the explicit diagnosis of left knee contusion by Dr. Pellerin, a qualified physician under FECA, was invalid. Therefore, OWCP has not adequately explained the basis for rescinding its acceptance of appellant's claim for left knee contusion. OWCP's procedures provide that, when it has been determined that the original decision may have been issued in error, the claims examiner is responsible for performing any necessary case development to fully resolve the issue. If, after proper development, it is established that the original decision was issued in error, the claims examiner is responsible for issuing a proposed and final decision rescinding the original

---

<sup>5</sup> See *L.M.*, Docket No. 19-0705 (issued September 11, 2019); *John W. Graves*, 52 ECAB 160, 161 (2000). See also 20 C.F.R. § 10.610.

<sup>6</sup> *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

<sup>7</sup> *V.R.*, Docket No. 18-1179 (issued June 11, 2019).

<sup>8</sup> See *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

<sup>9</sup> See *W.H.*, Docket No. 17-1390 (issued April 23, 2018).

finding.<sup>10</sup> The Board notes that, prior to finalizing its rescission action, OWCP did not develop the medical evidence with Dr. Pellerin or otherwise obtain evidence which would adequately explain its determination that the left knee contusion diagnosis provided on July 1, 2013 was invalid.

The Board finds that OWCP did not clearly explain its determination that its prior acceptance of appellant's claim for left knee contusion was erroneous, and it therefore improperly rescinded its prior acceptance of this condition.<sup>11</sup> In order to rescind acceptance of a given condition, OWCP must show that the weight of the reliable evidence establishes that the acceptance of the claim was erroneous.<sup>12</sup> The evidence used to rescind a claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated and why the original decision is now being invalidated.<sup>13</sup> For the above-described reasons, OWCP has not met these requirements for justifying its rescission action in the present case.<sup>14</sup>

### CONCLUSION

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

---

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.19(b) (February 2013). OWCP's procedures further provide that such development might include requesting a medical report from the claimant's treating physician. *Id.* at Chapter 2.1400.19(c).

<sup>11</sup> *Compare K.E.*, Docket No. 18-1191 (issued April 15, 2020) (OWCP provided clear explanation for the basis of its rescission action).

<sup>12</sup> *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *A.W.*, Docket No. 11-1915 (issued August 21, 2012). *See also D.S.*, Docket No. 17-0250 (issued August 29, 2017).

<sup>13</sup> *See supra* note 10 at Chapter 2.1400.19(d). *See also D.S.*, Docket No. 17-0250 (issued August 29, 2017).

<sup>14</sup> Given the Board's disposition of the merit issue of this case, the nonmerit issue is moot. The Board further notes that, with respect to the submitted April 27, 2018 Form CA-16 from Dr. Harding, a properly completed Form CA-16 form authorization 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. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 30, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board