

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

S.C., Appellant	)	
	)	
and	)	Docket No. 19-1045
	)	Issued: July 24, 2020
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Oklahoma City, OK, Employer	)	
	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 12, 2019 appellant filed a timely appeal from December 4, 2018 and April 4, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 has met its burden of proof to rescind its acceptance of the claim.

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<sup>1</sup> The Board notes that following the April 4, 2019 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.*

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

## **FACTUAL HISTORY**

On September 15, 2018 appellant, then a 48-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2018 she injured her back when she slipped in water on the floor and braced herself to avoid falling while in the performance of duty. A witness indicated that appellant reported to her that she almost fell as she came in the door. Appellant initially sought medical attention on September 15, 2018.

In an October 1, 2018 development letter, OWCP requested that appellant submit additional evidence in support of her claim. It advised her of the type of factual and medical evidence needed and afforded her 30 days to respond.

In a letter dated October 15, 2018, the employing establishment challenged appellant's claim based on video footage of the September 14, 2018 incident. It asserted that at 11:08 a.m. appellant reentered the building, noticed something on the floor, looked down, stepped around it, and continued walking normally. The employing establishment asserted that there was no fall, slip, or brace as she had alleged. It noted that a copy of the video and investigative interview were both available upon request.<sup>3</sup>

On September 26, 2018 Dr. John W. Ellis, a Board-certified family practitioner, described the September 14, 2018 incident, noting that appellant saw the floor was wet, tensed up and tried not to slip, but felt something pull in her low back. He diagnosed lumbar spine strain, lumbar radiculopathy, right knee sprain, and right knee internal derangement.

By decision dated November 7, 2018, OWCP accepted appellant's claim for lumbar sprain. It further found that the factual history of the claim did not support the additional medical diagnoses of lumbar radiculopathy, right knee sprain, and right knee internal derangement.

On September 15, 2018 appellant sought treatment in the emergency room. Dr. Elizabeth Magann, an osteopath, reported that on September 14, 2018 appellant was bracing for a fall and twisted her back. Appellant denied any other trauma. Dr. Magann diagnosed acute low back pain without sciatica.

In a November 19, 2018 report, Dr. Ellis described appellant's history of injury on September 14, 2018 and described her initial symptoms of low back pain. He also noted that on March 25, 2016 appellant had undergone left knee arthroplasty. Dr. Ellis reported that due to the severe pain in her back, appellant was "favoring her total knee" and began having significant pain in her right knee. He found that appellant's right knee was buckling and giving way. Dr. Ellis opined that appellant's accepted condition of lumbar sprain should be expanded to include lumbar radiculopathy, right knee internal derangement, and right knee sprain. He opined that these additional conditions were causally related to the September 14, 2018 employment injury. Dr. Ellis explained that when appellant noticed she was in a wet area, she immediately tensed up, which caused abnormal biomechanical forces through her lumbar spine putting pressure on the discs. The increased inflammation in her lumbar spine caused irritation of the spinal nerve roots where they exit the spinal canal causing radicular symptoms into her lower extremity. He further

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<sup>3</sup> The employing establishment did not submit the investigative report or video at that time.

found that when appellant tensed her body to avoid falling, this put abnormal biomechanical forces through her right knee causing shearing of the meniscus. Dr. Ellis concluded that appellant required medical treatment due to these additional conditions.

By decision dated December 4, 2018, OWCP found that the November 7, 2018 acceptance had been issued in error. It explained that it had “inadvertently issued an acceptance letter” on November 7, 2018. OWCP then noted that appellant, a federal employee, had filed a timely claim, that the incident had occurred, and that a medical condition had been diagnosed in connection with the injury or event. However, it denied appellant’s September 14, 2018 traumatic injury claim finding that she was not in the performance of duty at the time the injury occurred. OWCP relied upon the employing establishment’s challenge statement, which included an interpretation of its review of the video footage.

On December 7, 2018 OWCP indicated that it had received a compact disc (CD).

On November 28, 2018 appellant underwent a magnetic resonance imaging (MRI) scan of her lumbar spine which demonstrated a disc protrusion at L5-S1 which was retro-displacing the proximal right S1 nerve root.

In a December 19, 2018 e-mail response to a senatorial inquiry, OWCP noted that it had initially accepted appellant’s claim on November 7, 2018. It reported that the employing establishment had provided a video in the form of a CD and that after reviewing the images, OWCP found that appellant had not sustained an injury on the job, as alleged. OWCP further reported that it rescinded the November 7, 2018 decision by decision dated December 4, 2018.<sup>4</sup>

In a December 17, 2018 report, Dr. Ellis again described the September 14, 2018 employment incident. He noted that appellant spotted something wet on the floor, immediately tensed up and tried to walk slower while looking down, and immediately felt something pull in her low back. Dr. Ellis noted that appellant completed her work shift on September 14, 2018, noticed increased symptoms at work on September 15, 2018, and sought medical treatment on that date.

Dr. Joseph B. Cox, a neurosurgeon, diagnosed L5-S1 disc herniation in a December 18, 2018 report, based on appellant’s November 28, 2018 MRI scan, with associated back pain and right leg pain. He reported on September 14, 2018 that appellant experienced a work-related injury when she felt a pop in her low back. On January 21, 2019 he found that appellant’s L5-S1 disc herniation did not correspond to her radicular symptoms.

On February 5, 2019 appellant requested reconsideration of the December 4, 2018 OWCP decision. She asserted that the employment incident occurred at her place of employment, inside the premises, and during her work hours. Appellant reported that she felt a pop and pull in her lower back from tensing her body to avoid falling on September 14, 2018. She did not realize that she had experienced a traumatic injury until she returned to her work duties. On September 15,

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<sup>4</sup> On January 4, 2019 appellant requested an oral hearing from an OWCP hearing representative. By decision dated January 15, 2019, OWCP’s Branch of Hearings and Review denied her request for an oral hearing as untimely as it was postmarked more than 30 days after the December 4, 2019 OWCP decision and could be addressed through the submission of new evidence in the reconsideration process.

2018 she could not perform her work duties due to pain in her lower back and right leg. Appellant left work on September 15, 2018 to seek medical treatment.

On February 25, 2019 OWCP indicated that it had received a blank CD on December 7, 2018.

In a March 6, 2019 report, Dr. Ellis described appellant's September 14, 2018 employment incident and noted that she returned to her work duties of pushing steel wire cages weighing between 500 and 1,000 pounds. He reported that as she worked, appellant's back pain increased. On September 15, 2018 appellant returned to work and had trouble bending and lifting as well as pushing the steel wire cages. Appellant's right knee pain also increased with buckling and giving way. Dr. Ellis again requested that the acceptance of appellant's claim be expanded to include lumbar radiculopathy, right knee internal derangement, and right knee sprain.

In a letter dated March 27, 2019, the employing establishment asserted that it had mailed a digital video disc (DVD) on March 25, 2019. It repeated its prior allegations that, based on its review of the DVD, appellant had not slipped or braced herself, but saw something on the floor, stepped over it, and continued on her way. The employing establishment alleged that she continued to work her full eight-hour shift from September 14 through October 24, 2018. It provided a report of an investigative interview dated September 25, 2018 during which appellant explained that on Friday, September 14, 2018, as she entered the building, she saw what she believed was water on the floor, slid and caught herself from falling, but continued to work. Appellant further noted that if she had not hurt herself avoiding a slip, then she injured her back on the workroom floor on September 14 and 15, 2018. However, she noted that her back had already begun hurting before her work shift on September 15, 2018.

On April 1, 2019 OWCP noted that it had received a DVD/CD containing surveillance video footage. However, it further noted that the evidence "could not be scanned," but was a part of the file. This evidence, however, was not of record.

By decision dated April 4, 2019, OWCP modified the December 4, 2018 decision to a denial based on the factual evidence rather than performance of duty. It noted that the case was initially accepted on November 7, 2018 for a lumbar sprain. OWCP noted that, after further review, it was determined that the case was accepted in error due to a lack of full investigation surrounding the true facts of the injury and the performance of duty aspect of the case. It further indicated that it had reviewed the video surveillance footage on April 4, 2019 and that this footage established that the September 14, 2018 incident had not occurred as alleged.

### **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>5</sup> 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

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<sup>5</sup> 5 U.S.C. § 8128.

decision.<sup>6</sup> 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.<sup>7</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>8</sup>

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument and/or rationale.<sup>9</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>10</sup>

### ANALYSIS

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

The Board finds that the December 4, 2018 decision rescinding acceptance of the claim failed to provide a clear explanation or its rationale. Rather, this decision provided only a conclusory finding that appellant was not in the performance of duty at the time of the alleged employment injury. OWCP did not explain how or why she was not in the performance of duty on September 14, 2018 when the record establishes that she was on the employing establishment premises and performing employing duties at the time of the incident. The issue in the April 4, 2018 decision should have been whether OWCP had properly met its burden of proof to rescind acceptance of the claim.<sup>11</sup>

As OWCP attempted to rescind the acceptance of appellant's claim for a traumatic injury, it must follow its established procedures for rescission.<sup>12</sup> Its procedures require a proposed and final decision rescinding the original finding.<sup>13</sup> These procedures further provide that a rescission

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<sup>6</sup> *M.H.*, Docket No. 19-0941 (issued April 29, 2020); *W.H.*, Docket No. 17-1390 (issued April 23, 2018); 20 C.F.R. § 10.610.

<sup>7</sup> *M.H.*, *id.*; *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

<sup>8</sup> *M.H.*, *id.*; *V.R.*, Docket No. 18-1179 (issued June 11, 2019).

<sup>9</sup> *M.H.*, *id.*; *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

<sup>10</sup> *M.H.*, *id.*; *W.H.*, *supra* note 6.

<sup>11</sup> *T.H.*, Docket No. 15-1372 (issued September 20, 2016).

<sup>12</sup> *L.M.*, Docket No. 16-1464 (issued November 1, 2017).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.19(b) (February 2013).

decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded.

In its December 4, 2018 and April 4, 2019 decisions, OWCP did not follow the specific procedures for a rescission decision as it failed to provide a proposed decision rescinding the original finding, and failed to inform appellant of an accurate basis of its rescission decision.<sup>14</sup> Furthermore, it failed to provide a clear explanation or its rationale for rescission. OWCP failed to thoroughly discuss the evidence used to rescind the claim so that it is clear to the reader how the case was incorrectly adjudicated, and why the original decision is now being invalidated.<sup>15</sup> It has not complied with its own procedures and thus, has not met its burden of proof to rescind acceptance of appellant's claim for a traumatic injury.<sup>16</sup>

As the Board has determined that OWCP has not met its burden of proof to rescind acceptance of the claim, the Board will reverse the December 4, 2018 and April 4, 2019 decisions.

### **CONCLUSION**

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

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<sup>14</sup> *S.R.*, Docket No. 12-1404 (issued December 11, 2012).

<sup>15</sup> *T.H.*, *supra* note 11.

<sup>16</sup> *See S.R.*, Docket No. 09-2332 (issued August 16, 2010) (once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits; this holds true where OWCP later decides that it erroneously accepted a claim). *T.H.*, *supra* note 11; *Ixtala Ccihuahatl*, 49 ECAB 427 (1998); *supra* note 13 at Chapter 2.1400.19.c. (February 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2019 and December 4, 2018 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 24, 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