United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 21-0608**
	)	**Issued: November 28, 2022**
DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, Gardena, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10, 2021 appellant, through counsel, filed a timely appeal from a January 19, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 January 19, 2021 decision, appellant submitted additional evidence to OWCP. 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 appellant met his burden of proof to establish that the acceptance of his claim should be expanded to include lumbar radiculopathy.

FACTUAL HISTORY

On October 14, 1999 appellant, then a 54-year-old regional director, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 1998 he sustained a low back injury when he was loading launch equipment into the trunk of his car while in the performance of duty.

On January 31, 2001 appellant underwent an OWCP-authorized left L4 hemilaminectomy, L3-4 and L4-5 microdiscectomies, and exploration of the spinal canal at L4 between L3-4 and L4-5 with microscope and evoked potentials, performed by Dr. Martin Krell, a Board-certified neurosurgeon.

By decision dated February 16, 2021, OWCP accepted appellant's claim for a herniated disc.

Appellant returned to light-duty work for four hours a day effective March 11, 2002. He again stopped work on or about June 24, 2002 and did not return. OWCP accepted a recurrence of total disability commencing June 24, 2002. It paid appellant wage-loss compensation on the supplemental and periodic rolls.

In a January 27, 2004 report, Dr. Todd H. Lanman, a Board-certified neurosurgeon, diagnosed recurrent disc herniation at L3-4 and L4-5 with foraminal encroachment, bilateral L4, L5, and S1 radiculopathy, left greater than right, and biomechanical low back pain secondary to disc pathology at L3-4 and L4-5. He recommended L3, L4, and L5 laminectomies and left L4-5 microdiscectomy as appellant had worsening lower extremity weakness and sensory deficits.

On March 22, 2004 OWCP referred the record, a statement of accepted facts (SOAF), and a series of questions to Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to determine whether the surgery recommended by Dr. Lanman was reasonable and medically necessary to treat the accepted employment conditions. Dr. Simpson submitted an April 2, 2004 report recommending approval of the proposed surgery. Additionally, he opined that OWCP should "expand the work-related condition to include disc pathology at L3-4 and L4-5, with L4, L5, and S1 bilateral radiculopathy, left greater than right."

On May 24, 2004 OWCP referred appellant, the medical record, a SOAF, and a series of questions to Dr. Marshall L. Grode, a Board-certified neurosurgeon, for a second opinion on appellant's work capacity and whether the surgery proposed by Dr. Lanman was necessary to treat the accepted conditions.

In reports dated June 15 and July 22, 2004, Dr. Grode opined that appellant required foraminal decompression, reexploration, and transforaminal fusion at L4-5. He opined that appellant's lumbar and bilateral lower extremity pain was caused by lumbar spondylolisthesis, degenerative changes at L3-4, and a bony abnormality with foraminal narrowing at the L4-5 interspace.

On September 28, 2004 appellant underwent OWCP-authorized anterior lumbar arthrodesis with application of prosthetic device at L3-4 and L4-5, and partial vertebral corpectomy at L3, L4, and L5, and application of bone allograft at L3-4 and L4-5, performed by Dr. Lyton A. Williams, a Board-certified orthopedic surgeon.

On September 30, 2004 appellant underwent posterolateral lumbar arthrodesis at L3-4 and L4-5, posterior segmental fixation from L3 to L5, and right iliac crest graft harvest, performed by Dr. Williams.

Dr. Williams submitted periodic progress notes dated January 10 through May 23, 2005 recounting appellant's continued lumbar and bilateral lower extremity pain.

In a SOAF dated June 6, 2005, OWCP noted that it had accepted a herniated L3-4 disc with radiculopathy.

OWCP continued to receive reports from Dr. Williams dated July 6, 2005 through March 12, 2007, noting continued lumbar pain with radiation into both lower extremities.[4] Dr. Williams diagnosed S1 radiculopathy in reports dated October 3, 2005, January 29 and March 12, 2007.

On September 9, 2005 OWCP expanded its acceptance of the claim to include bilateral shoulder bursitis and right rotator cuff tear.

In a June 18, 2007 report, Dr. Williams requested that OWCP authorize hardware removal with decompression and fusion.

On July 6, 2007 OWCP referred the medical record and a July 6, 2007 SOAF to Dr. Simpson to determine if the recommended surgery was reasonable and necessary. The SOAF did not include lumbar radiculopathy among the accepted conditions.

In a July 22, 2007 report, Dr. Simpson noted that OWCP had accepted thoracic or lumbosacral neuritis or radiculitis and displacement of lumbar intervertebral disc without myelopathy. He opined that the proposed surgery was medically reasonable and necessary to treat the accepted employment conditions.

In a January 11, 2008 development letter, OWCP requested that Dr. Williams complete an updated work capacity evaluation (Form OWCP-5c). Regarding the lumbar spine, it did not note lumbar radiculopathy as an accepted condition.

In a February 8, 2008 vocational rehabilitation referral, OWCP noted that it had accepted L3-4 disc herniation with radiculopathy.

On May 29, 2008 Dr. Williams performed OWCP-authorized hardware removal, decompression of L5 nerve root, left sided, L5-S1 interbody fusion, total L5-S1 discectomy, pedicle screw insertion at L5-S1, intertransverse process fusion on posterior fusion at L5-S1. He

[4] In an August 22, 2005 report, Dr. Williams opined that appellant had developed right shoulder bursitis and a right rotator cuff tear due to constant pressure from ambulating with a cane due to the employment-related spine conditions.

submitted periodic reports dated June 2, 2008 through February 4, 2015, noting continued lumbar pain with bilateral radiculopathy.[5]

Dr. Bryan C. Oh, a Board-certified neurosurgeon, treated appellant from November 19, 2014 through August 31, 2015. He diagnosed lumbar spondylosis and lumbago.

Dr. Hamid R. Mir, a Board-certified orthopedic surgeon, provided reports dated November 30, 2015 through August 8, 2018 diagnosing lumbar degeneration,[6] bilateral lumbosacral radiculitis, and lumbar pain status-post multiple lumbar surgeries.

On December 14, 2018 OWCP referred appellant, the medical record, a SOAF dated December 11, 2018, and a series of questions to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of the accepted conditions, appellant's work capacity, and whether appellant had reached maximum medical improvement (MMI). The SOAF listed the accepted lumbar condition as herniated disc at L3-4.

In a January 17, 2019 report, Dr. Einbund reviewed the medical record and SOAF. He recounted appellant's symptoms of lumbar pain radiating into both lower extremities to the feet. On examination Dr. Einbund observed significant lumbar tenderness to palpation, bilaterally positive straight leg raising tests, decreased sensation over the plantar aspect of both feet, and bilaterally diminished patellar and Achilles reflexes. He found that appellant had attained MMI in September 2016. Dr. Einbund opined that appellant continued to have residuals of the accepted conditions, with "added levels of involvement, which have occurred as a consequence of the original injury and surgical treatment thereof." He indicated that appellant could perform sedentary work for four hours a day.

In a March 11, 2019 letter, appellant, through counsel, noted that the December 11, 2018 SOAF provided to Dr. Einbund had not listed lumbar radiculopathy as an accepted condition. Counsel requested that OWCP expand acceptance of appellant's claim to include lumbar radiculopathy, based on the medical record as a whole, and Dr. Einbund's opinion that appellant had developed consequential conditions.

In a development letter dated April 10, 2019, OWCP noted that its audit of the medical evidence of record found that the term radiculopathy had been occasionally mentioned in the record over the last 20 years, and that various physicians had mentioned lumbar radiculopathy in their reports. It noted that the condition "does appear to have been objectively established by a physician." However, the record did not contain medical rationale from a physician explaining how the accepted employment injury had caused lumbar radiculopathy. OWCP advised appellant

[5] A September 24, 2009 electromyogram and nerve conduction velocity (EMG/NCV) study of both lower extremities demonstrated mild-to-moderate acute radiculopathy bilaterally of the S2 greater than S1 nerve roots, left greater than right, and significant chronic radiculopathy of bilateral S1 and left L4 nerve root. A December 5, 2012 EMG/NCV study demonstrated right tibial motor neuropathy, bilateral L5 radiculopathy, and S1 radiculopathy.

[6] A January 6, 2016 lumbar computerized tomography (CT) scan demonstrated postoperative changes of prior lower lumbar spine fusion, multilevel degenerative disc disease with possible moderate narrowing of the left L4-5 and L5-S1 neural foramina. A February 2, 2016 lumbar CT scan demonstrated degenerative related uptake in the superior endplate of L3, nonspecific activity in the mid S1 vertebral body, and a stable fusion. July 23, 2018 lumbar x-rays demonstrated postsurgical changes related to prior lumbar fusion at L3-4 and L5-S1, with multilevel degenerative changes of the thoracolumbar spine proximal to the fused levels.

of the additional evidence needed to expand acceptance of the claim, including a report from his physician explaining how the accepted employment injury caused or aggravated an additional medical condition. It afforded appellant 30 days to respond.

In response, appellant, through counsel, submitted an April 23, 2019 statement contending that OWCP had accepted lumbosacral radiculopathy in 2005, as listed in the June 6, 2005 SOAF and a February 2008 vocational referral. Additionally, appellant's physicians diagnosed lumbar radiculopathy in reports from April 9, 2001 onward, and Dr. Einbund noted consequential conditions in his second opinion report.

In an April 25, 2019 report, Dr. Mir diagnosed lumbosacral radiculopathy.

By decision dated May 14, 2019, OWCP denied expansion of the acceptance of appellant's claim to include lumbar radiculopathy as the medical evidence of record did not establish that the condition was causally related to the accepted employment injury.

In a May 23, 2019 report, Dr. Mir recounted appellant's worsening symptoms of lumbar pain radiating into both lower extremities. He diagnosed lumbosacral radiculopathy and low back pain.

On January 29, 2020 OWCP referred appellant, the medical record, and an updated SOAF to Dr. Einbund to clarify his opinion on appellant's work capacity.[7] Dr. Einbund submitted a February 13, 2020 report in which he reviewed the medical record and SOAF. He recounted appellant's symptoms of lumbar pain radiating into both legs and feet. On examination of the back and lower extremities, Dr. Einbund observed limited lumbar range of motion, and bilaterally positive straight leg raising tests. He obtained lumbosacral x-rays, which demonstrated an interbody fusion at L3-4 and L4-5, with fixation hardware between L5 and S1. Dr. Einbund opined that appellant continued to have residuals of the accepted lumbar condition superimposed on age-related degenerative changes. He found appellant able to perform sedentary work for four hours a day.

On May 13, 2020 appellant, through counsel, requested reconsideration. She contended that Dr. Mir's May 23, 2019 report was sufficient to establish expansion of acceptance of appellant's claim to include lumbar radiculopathy.

By decision dated May 20, 2020, OWCP denied modification of the prior decision.

On October 21, 2020 appellant, through counsel, requested reconsideration. Counsel asserted that OWCP should include disc pathology at L3-4 and L4-5, with bilateral radiculopathy at L4, L5, and S1, left greater than right, based on Dr. Simpson's April 2, 2004 opinion as the DMA.

By decision dated January 19, 2021, OWCP denied modification of the prior decision.

[7] By decision dated June 7, 2019, OWCP reduced appellant's wage-loss compensation pursuant to 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104 as he failed to comply with vocational rehabilitation. Following an oral hearing with a representative of OWCP's Branch of Hearings and Review, by decision dated December 20, 2019, OWCP's hearing representative reversed OWCP's June 7, 2019 decision. The hearing representative directed OWCP to request clarification from Dr. Einbund regarding appellant's work capacity.

LEGAL PRECEDENT

Section 8128 of FECA[8] 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.[9] 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 issue a new decision.[10] 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.[11]

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.[12] It is well established that, once OWCP accepts a claim, it has the burden of proof justifying the termination or modification of compensation benefits. OWCP burden of proof justifying termination or modification of compensation holds true where it later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, it is required to provide a clear explanation of the rationale for rescission.[13] 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.[14]

ANALYSIS

OWCP has adjudicated this case as whether appellant met his burden of proof to establish that the acceptance of his claim should be expanded to include lumbar radiculopathy. Under the circumstances of this case, however, the Board finds that the proper issue is whether OWCP has met its burden of proof to rescind the acceptance of appellant's claim for lumbar radiculopathy.

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

OWCP accepted appellant's traumatic injury claim for a herniated L3-4 disc. Dr. Simpson, a DMA, opined in an April 2, 2004 report that OWCP should expand its acceptance of appellant's claim to include bilateral L4, L5, and S1 bilateral radiculopathy. In a SOAF dated June 6, 2005,

[8] *Supra* note 2.

[9] 5 U.S.C. § 8128.

[10] *D.R.*, Docket No. 16-0189 (issued September 2, 2016).

[11] *See* 20 C.F.R. § 10.610.

[12] *See D.V.*, Docket No. 16-0849 (issued March 6, 2017); *L.C.*, 58 ECAB 493 (2007).

[13] *R.B.*, Docket No. 22-0910 (issued June 21, 2022); *J.C.*, Docket No. 21-0755 (issued December 20, 2021); *see D.P.*, Docket No. 18-1213 (issued July 30, 2020); *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

[14] *See W.H.*, Docket No. 17-1390 (issued April 23, 2018).

OWCP listed L3-4 radiculopathy as an accepted condition. Additionally, lumbar radiculopathy was not among the accepted conditions contained in a July 6, 2007 SOAF. OWCP, in a January 11, 2008 development letter to Dr. Williams, did not mention that it had accepted lumbar radiculopathy. However, in a February 8, 2008 vocational rehabilitation letter OWCP noted that it had accepted L3-4 radiculopathy.

The Board finds that the SOAFs dated June 6, 2005 and July 6, 2007, and the February 8, 2008 vocational rehabilitation letter establish that OWCP had accepted lumbar radiculopathy. OWCP's procedures emphasize the crucial importance of the SOAF in establishing the factual underpinnings of the claim, including a complete and accurate recitation of the accepted conditions.[15] However, in the December 11, 2018 SOAF provided to Dr. Einbund, OWCP noted L3-4 disc herniation as the only accepted lumbosacral condition.

OWCP denied expansion of acceptance of appellant's claim in its January 19, 2021 decision, finding that appellant had not met his burden of proof to establish an additional condition of lumbar radiculopathy. The Board finds, however, that OWCP had accepted lumbar radiculopathy as noted in the SOAFs dated June 6, 2005 and July 6, 2007, and the February 8, 2008 vocational rehabilitation letter. OWCP's determination that the burden of proof should be shifted to appellant is, thus, erroneous.

As OWCP attempted to rescind its acceptance of lumbar radiculopathy it must follow its established procedures for rescission.[16] Its procedures require a proposed and final decision rescinding the original finding.[17] These procedures further provide that a rescission 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.[18]

Herein, OWCP failed to provide a proposed decision rescinding its acceptance of lumbar radiculopathy.[19] Instead, it improperly shifted the burden of proof to appellant to provide rationalized medical evidence establishing that the December 24, 1998 employment injury had caused an additional medical condition. OWCP has, therefore, not complied with its own procedures and, thus, failed to meet its burden of proof to rescind its acceptance of lumbar radiculopathy.[20]

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.5g (September 2007).

[16] *J.A.*, Docket No. 21-0912 (issued February 18, 2022); *L.M.*, Docket No. 16-1464 (issued November 1, 2017).

[17] *Supra* note 15 at Chapter 2.1400.19(b) (February 2013).

[18] *Id*. at Chapter 2.1400.19(d) (February 2013).

[19] *See S.C.*, Docket No. 19-1045 (issued July 24, 2020); *S.R.*, Docket No. 12-1404 (issued December 11, 2012).

[20] *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.*, Docket No. 15-1372 (issued September 20, 2016); *Ixtala Ccihuatl*, 49 ECAB 427 (1998); *supra* note 15 at Chapter 2.1400.19.c. (February 2013).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 28, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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