

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

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<b>L.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0293</b>
	)	<b>Issued: May 4, 2023</b>
<b>DEPARTMENT OF VETERANS AFFAIRS, VA</b>	)	
<b>EDUCATION CALL CENTER, Muskogee, OK,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 23, 2020 appellant, through counsel, filed a timely appeal from a November 18, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

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<sup>1</sup> 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.

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

## ISSUE

The issue is whether OWCP has met its burden of proof to rescind its acceptance of appellant's claim for neck sprain and displacement of cervical intervertebral disc without myelopathy.

## FACTUAL HISTORY

On February 28, 2011 appellant, then a 41-year-old veterans' claims examiner, filed a traumatic injury claim (Form CA-1) alleging that at approximately 9:15 a.m. on February 11, 2011 she injured her back, left knee, wrists, and right shoulder when she fell while walking from the employing establishment building to a neighboring privately-owned store during a break. She explained that, after she fell, a coworker helped her up and she noticed a rock on the ground. On the reverse side of the claim form, the employing establishment acknowledged that appellant was in the performance of duty when injured. It noted her duty hours as 6:30 a.m. to 3:00 p.m., Monday through Friday. Appellant stopped work on February 14, 2011 and returned to work on February 16, 2011.

In a February 16, 2011 witness statement, S.N., appellant's coworker, noted that on February 11, 2011 she and appellant were walking to the store when appellant fell in front of the employing establishment's building, rolling to her side and hitting her knees. She asserted that appellant had stepped on or tripped over a rock. S.N. further contended that the rock "obviously came from the front structure of the building that is made of small rocks."

In an undated statement, J.R., an employing establishment manager, noted that on February 11, 2011 she was walking between the store and the west entrance of the employing establishment when she witnessed appellant fall almost directly in front of her. She noted that appellant's foot or ankle twisted and she fell. J.R. related that the security officer on duty came out of the employing establishment's building to check on appellant. She further noted that she saw a piece of rock on the ground where appellant fell and pushed the rock out of the walking area toward the building.

By decision dated June 20, 2011, OWCP accepted the claim for neck sprain.

On March 1, 2013 Dr. Richard L. Drake, a Board-certified orthopedic surgeon, requested authorization to perform a C4-5 and C5-6 anterior cervical discectomy and fusion due to complaints of ongoing pain and worsening findings demonstrated in a January 22, 2013 magnetic resonance imaging (MRI) scan. On March 7, 2013 OWCP denied authorization for the requested procedure.

Thereafter, on March 7, 2013, OWCP referred appellant and the case record, along with a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to review additional diagnoses and determine whether the requested surgery was medically necessary. In a March 14, 2013 report, the DMA found that the proposed surgery was medically necessary and related to the accepted work injury. He also recommended that appellant's claim should be expanded to include displacement of cervical intervertebral disc without myelopathy.

On April 8, 2013 OWCP expanded the acceptance of appellant's claim to include displacement of cervical intervertebral disc without myelopathy.

On May 29, 2013 appellant underwent an OWCP-authorized anterior cervical discectomy and fusion.

OWCP paid appellant wage-loss compensation on the supplemental rolls beginning May 29, 2013, and on the periodic rolls beginning June 30, 2013. It also paid wage-loss compensation for temporary total disability for the period July 29 through August 12, 2013.

In an August 14, 2013 memorandum of telephone call (Form CA-110), appellant notified OWCP that she had returned to work on August 13, 2013.

In a December 11, 2017 letter, OWCP notified counsel that appellant's case was administratively closed with all benefits paid and recommended that she file a notice of recurrence (Form CA-2a) if she believed that she needed additional medical treatment related to the accepted February 11, 2011 employment injury.

On February 26, 2019 appellant filed a Form CA-2a, alleging that she sustained a recurrence of disability on March 15, 2012 due to her accepted February 11, 2011 employment injury.

In a March 6, 2019 development letter, OWCP provided a definition of a recurrence of disability. It advised appellant of the type of factual and medical evidence necessary to establish her recurrence claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

By decision dated May 21, 2019, OWCP denied appellant's recurrence claim, finding that she had not submitted sufficient medical evidence to demonstrate that she was totally disabled due to a material change/worsening of the accepted work-related conditions.

On May 29, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated July 19, 2019, OWCP's hearing representative found that the case was not in posture. The hearing representative set aside the May 21, 2019 decision and remanded the case for further development on the issue of performance of duty.

In a September 17, 2019 development letter, OWCP requested that the employing establishment address whether appellant was on premises that it owned, operated, or controlled at the time of the accepted February 11, 2011 employment incident and, if so, to provide a diagram showing the boundaries of its premises and the location of the alleged incident. It further requested information regarding whether she was performing work duties or activities reasonably incidental to her employment at the time of the incident. OWCP afforded 30 days to respond.

In a November 7, 2019 development letter, OWCP again requested that the employing establishment provide the requested information. It afforded 15 days to respond.

In a November 22, 2019 response to OWCP's development questionnaire, the employing establishment indicated that appellant was on the front sidewalk of the employing establishment at the time of her injury. It noted that she was on a break at the time of her injury and was not engaged in official duties that required her to be off premises or performing assigned duties. The employing establishment also attached a diagram of its building, including where the neighboring store was located in relation to the employing establishment's facility.

In a December 17, 2019 e-mail, OWCP notified the employing establishment that the November 22, 2019 response failed to address whether it owned, operated, or controlled any part of the area in front of its building. It also noted that the employing establishment's diagram failed to show the boundaries of the buildings.

In a January 3, 2020 e-mail, the employing establishment notified OWCP that it was attaching a diagram with the boundary line drawn between the store and the employing establishment. It indicated that it did not own the property at the time and that the area was not part of their premises. The employing establishment contended that the location the accident occurred was on the leased property side of the store. It attached a new diagram, which showed the boundaries between the store and the employing establishment.

In an April 22, 2020 letter, OWCP advised appellant that it proposed to rescind its prior acceptance of her claim for neck sprain and displacement of cervical intervertebral disc without myelopathy because the claim was accepted in error. It noted that the employing establishment had established that she was not in the performance of duty when she fell on February 11, 2011.

In an August 8, 2019 statement, appellant recalled that the employment incident occurred when she fell in the entrance/exit of the employing establishment while on her way to the store. She contended that her fall occurred on the premises and/or property of the employing establishment, not on the side of the store. Appellant noted that two witnesses saw that her fall occurred while still on the premises/property of the employing establishment. She explained that the store and the employing establishment shared the same building.

In a May 4, 2020 letter, counsel asserted that the employing establishment was falsely contending that appellant was not in the course of her employment. He noted that she fell while she was on her mandatory break. Counsel argued that OWCP's attempt to rescind its acceptance was without any legal merit.

By decision dated June 15, 2020, OWCP finalized the proposed rescission of the acceptance of appellant's claim for neck sprain and displacement of cervical intervertebral disc without myelopathy. It found that, at the time of her injury, she was not in the performance of duty or assigned duties, and that the property where the injury occurred was not owned, operated, or leased by the employing establishment.

On June 19, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 22, 2020 statement, appellant recalled that she had been under indiscernible stress. She again asserted that she had two witnesses, including a manager, to the employment

incident. Appellant reiterated that she fell in front of the employing establishment's building while on her mandatory break.

During the hearing, held on September 3, 2020, counsel argued that appellant's injury occurred during her mandatory paid break in the same area that she was assigned to work, noting that the store was another way to describe the same office park or facility. He also argued that walking to the store was within the custom of the employing establishment. Appellant testified that, on February 11, 2011, while taking her 15-minute mandatory break, she and her coworker exited through the door of the employing establishment, turned right, and were on the sidewalk in front of the employing establishment's building when a rock caused her to fall. She explained that her injury occurred in the smoke break area immediately outside the employing establishment's building. Appellant noted that while there was a breakroom at the employing establishment, which contained vending machines, employees were not required to take a break inside that room. She further indicated that it was the common practice among her coworkers and supervisors to leave the employing establishment during their breaks. Appellant explained that the employing establishment's facility and the store were connected under one building with different entries. She also noted that a manager witnessed her fall and provided a witness statement. Appellant indicated that she initially missed time from work after her injury but eventually returned to her preinjury duties. She noted that she sustained no new accident or injury that caused worsening of her condition since her February 11, 2011 employment injury. Appellant related that she underwent neck surgery in May 2013 and returned to work after making some recovery. She testified that when she filed the Form CA-2a in February 2019, she was still suffering from the same pain in her neck despite performing the same duties as before. Appellant acknowledged that she sustained a minor motor vehicle accident in 2018 but noted that she did not seek any medical care. She indicated that she medically retired in March 2019. Counsel argued that there were witnesses and that the map diagram showed how closely the facilities were located to each other.

By decision dated November 18, 2020, OWCP's hearing representative affirmed the June 15, 2020 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 own motion or on application.<sup>3</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 issue a new decision.<sup>4</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>5</sup>

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<sup>3</sup> 5 U.S.C. § 8128.

<sup>4</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>5</sup> *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

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>6</sup>

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument and/or rationale.<sup>7</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>8</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to rescind its acceptance of appellant's claim for neck sprain and displacement of cervical intervertebral disc without myelopathy.

In support of its rescission of the acceptance of appellant's claim, OWCP relied upon the employing establishment's November 22, 2019 and January 3, 2020 responses to OWCP's development questionnaire. In its November 22, 2019 response, the employing establishment acknowledged that appellant was on the front sidewalk of its facility at the time of her injury, noting that she was on her break at the time of her injury and was not engaged in official duties that required her to be off the premises or performing assigned duties. It also attached a diagram of its building, which showed where the store was located in relation to the employing establishment's facility. In a follow-up statement dated January 3, 2020, the employing establishment contended that appellant's injury occurred on the leased property side of the store, which was not part of its work area. It clarified that it did not own the property and attached a new diagram showing the boundary line drawn between the store and the employment establishment.

The Board, however, finds that the employing establishment's responses to OWCP's development questionnaire were insufficient to establish a basis for the rescission of appellant's claim as its responses do not establish that an error had been made in OWCP's acceptance of appellant's claim. The employing establishment did not establish that appellant was not in the performance of duty at the time of the February 11, 2011 injury. The Board has held that 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>9</sup>

As the evidence of record does not establish that OWCP erred in its acceptance of appellant's claim, the Board finds that OWCP failed to meet its burden of proof.

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<sup>6</sup> V.R., Docket No. 18-1179 (issued June 11, 2019).

<sup>7</sup> See L.G., Docket No. 17-0124 (issued May 1, 2018).

<sup>8</sup> See W.H., Docket No. 17-1390 (issued April 23, 2018).

<sup>9</sup> See D.P., Docket No. 18-1213 (issued July 30, 2020); L.G., *supra* note 7.

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to rescind its acceptance of appellant's claim for neck sprain and displacement of cervical intervertebral disc without myelopathy.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 18, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 4, 2023  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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