

FACTUAL HISTORY

On April 13, 2010 appellant, a 40-year-old African-American lead program analyst, filed an occupational disease claim for an emotional condition occurring the night of February 17, 2010, after seeing a toy monkey hanging from a noose.² He stopped work on April 4, 2010.

By decision dated July 15, 2010, OWCP denied appellant's claim for an emotional condition. It listed the essential elements for establishing a FECA claim and noted that causal relationship was not established. The decision made no finding as to the implicated employment incident of February 17, 2010.³

On August 18, 2010 appellant submitted a statement explaining that a coworker came to him on February 17, 2010 and told him of "a stuffed toy monkey hanging from a noose by its neck" on a bulletin board located in the management seating area of the Document Laboratory (DocLab). The coworker showed appellant a *Washington Post* editorial concerning a congressman's recent remark at a convention in Nashville. It described political party supporters as waving monkey dolls with nooses around their necks. The coworker suggested that there was a connection between the printed article and the monkey hanging on the bulletin board.

Appellant saw the monkey hanging from the bulletin board as his coworker had described. He explained that the monkey was positioned in plain sight and in such a way that every employee who walked in or out of DocLab would see it on the bulletin board. When the employees informed the lead program analyst about the monkey, she went to the management seating area and informed the supervisor, whose cubicle was closest to the bulletin board, that she thought the display was offensive and asked him to take it down. The supervisor removed the monkey from the bulletin board and put it on his cubicle's overhead bin for about eight days.

Appellant explained that the African-American employees found the hanging monkey to be racist, an offensive symbol of discrimination that had no place at work. He became mentally and emotionally disturbed by the incident and received medical care. Appellant experienced panic attacks, nervousness, nightmares, shortness of breath, "and I feel my heart rate increasing when I see a picture of a monkey(s) or anything construed as a noose...."

In a November 4, 2010 decision, OWCP accepted appellant's claim for adjustment disorder and post-traumatic stress disorder. It accepted as a compensable factor of employment that on February 17, 2010 appellant observed "a toy stuffed monkey hanging from a noose on a bulletin board" at work. It was removed on February 18, 2010 and placed on a coworker's cubicle for eight days before being placed out of sight. OWCP found that the medical evidence

² In a June 28, 2010 letter, the employing establishment advised that appellant worked the third shift from 9:00 p.m. to 7:30 a.m. on Sunday through Thursday at his request. It noted that he held a second job at a hotel in the private sector working 6:00 a.m. to 2:30 p.m. on Saturday and Sunday.

³ OWCP noted that in response to its developmental letter, appellant submitted a verification of medical treatment.

from appellant's physician, Dr. Victoria A. Tankeh, a psychiatrist, established causal relationship.⁴

On January 11, 2011 the employing establishment forwarded to OWCP a redacted version of an investigation report from the Office of the Inspector General (OIG). It was contended that the incident did not occur in the manner as alleged by appellant, as the toy monkey had been in the workplace for more than one year prior to the claim. First, it had been placed on top of a football; the toy representing a semi-private military joke about a monkey "screwing" a football. The football represented the DocLab workplace as it received unwanted work assignments and the priorities were always changed. The monkey and football were brought into the office sometime in the spring of 2009 and kept initially on top of a small refrigerator outside the supervisors' cubicles. The monkey was positioned with its arms wrapped around the football. It was secured to the football by a rubber band around its chest or armpits. Those responsible for its presence at work explained that it was their way of representing their frustration that DocLab was constantly overburdened.

One of the employees was promoted from DocLab and took the football with him in the fall of 2009. Another employee attached the monkey to the whiteboard with a rubber band. The employee explained that he placed an orange rubber band underneath the arms and across the chest of the toy monkey and hung it by a hook on the whiteboard. The monkey would occasionally fall down and be placed back on the board.

The OIG investigation determined that the complaint about the monkey being racially offensive was made shortly after publication of a February 17, 2010 *Washington Post* editorial addressing a recent political rally of people displaying monkey dolls with nooses around their necks. One employee explained that he had noticed the toy monkey lying around on a table in DocLab for a period of eight months, but first became disturbed when he saw the monkey hanging by a "rope" on the morning of February 18, 2010. Another employee suggested a connection between the article and the toy monkey hanging on the bulletin board. One employee showed the newspaper article to others and told the OIG that another employee had hanged the toy monkey as a racial joke, not intending to intimidate or offend people. Others found the toy monkey to be offensive.

Statements from several coworkers supported that the monkey had a noose or rope around its neck: "On February 18, 2010 I ... witness[ed] a toy monkey hanging from a bulletin board with a noose around its neck in the management seating area of the Document Laboratory in Winchester, Virginia." "I ... saw a monkey with a rope around its neck on Feb 17 2010." "On February 17, 2010, I walked by the management cubicle area in DocLab and saw a toy monkey hanging from a whiteboard kept in that area. The toy monkey was hanging by a noose around its neck. The noose was made from a red/orange rubber band." "I ... on 18 February 2010, witnessed a stuffed Toy Monkey hanging in the office of Doc Lab, at the ICRC,

⁴ Dr. Tankeh submitted an August 6, 2010 verification of treatment letter that diagnosed severe anxiety and depressive moods arising from the accepted incident at work. She noted that, while she initially diagnosed adjustment disorder, appellant's symptoms had progressed to post-traumatic stress disorder. Appellant was treated with therapy and psychotropic medications. Dr. Tankeh found appellant capable of returning to full-time employment as of April 12, 2011.

in Winchester, Virginia, by a noose around its neck.” As noted, the investigative report redacted the identities of the employees interviewed by OIG.

Other OIG interviewees, however, commented that the monkey was not displayed in a hangman’s noose. One employee first noticed the monkey on February 18, 2010, after a coworker told her about it. She stated the toy monkey was secured to the bulletin board with a red rubber band around its neck. Another employee first noticed the monkey later in the morning on February 18, 2010 hanging from the whiteboard with “what is supposed to be” a noose around its neck. Several employees reported they were not offended by the presence of the monkey because they knew that it represented a joke. Others were simply not offended. One was under the impression that the monkey was DocLab’s mascot because DocLab was considered an underdog.

Those responsible for the monkey’s presence in the office denied that displaying it was intended to have any racial overtones. One regretted that the monkey had offended his coworkers. One apologized for his ignorance in the symbolism associated with a monkey. Another employee believed that at least a third of the 75 DocLab employees were aware of the joke associated with the monkey and the football.

The OIG made the following findings:

“In sum, the OIG determined the toy monkey had been displayed in the supervisors’ area of the DocLab since sometime in the spring of 2009. The toy monkey was originally paired with a football and as a result of a military joke. The toy monkey was displayed in a number of configurations, as recalled by witnesses interviewed, and there was a consensus that it was attached to a rubber band, not a hangman’s noose. Although several DocLab employees were offended by the perceived symbolism associated with a monkey, the OIG found no evidence that [name redacted] or anyone else intended to display it as a racist symbol or to intimidate others.”

On January 14, 2011 OWCP advised appellant as to the January 11, 2011 letter and OIG report. In an April 5, 2011 letter, it notified him of the proposal to rescind acceptance of his emotional condition. Although the evidence supported that a toy stuffed monkey was found hanging on a bulletin board, it did not support that the incident constituted racial harassment of African-American employees or of appellant. “The evidence shows that the claimant perceived racial harassment because of the article in the *Washington Post* and the appearance of the hanging toy monkey during the same time.” OWCP noted that the mere perception of harassment or discrimination was not sufficient to establish a compensable factor of employment and there was insufficient evidence that harassment or discrimination did in fact occur.⁵

On April 26, 2011 appellant, through counsel, objected to the proposed rescission of the claim. Counsel contended that the OIG report supported the fact that the incident at work occurred, as alleged.

⁵ The notice of rescission cited generally to *Blondell Blassingame*, 48 ECAB 130 (1996) and *Anna C. Leanza*, 48 ECAB 115 (1996).

In a May 19, 2011 decision, OWCP reopened the case on its own motion and rescinded its acceptance of appellant's psychiatric injury claim. It noted that the fact that an incident occurred while employed did not bring the incident within the performance of duty.⁶

On May 31, 2011 counsel requested a hearing before an OWCP hearing representative that was held on September 19, 2011. At the hearing, appellant explained that DocLab was one big square space within which management had some cubicles. He stated that the monkey was hung near the main entrance/exit of DocLab:

“As you enter that doorway, to your left is the Unit Chief's cube and then 2 rows of cubes used by supervisor and leads. In the middle aisle of those 2 rows there stood a white erase board. The monkey was hung from that dry erase board in plain view of everyone entering and exiting DocLab. My cubicle is around the corner from where the dry erase board was situated. In order to reach my cubicle, I have to pass through the doorway and view the monkey hanging by its neck from a noose made from an industrial rubber band. I also have to view it each time I left DocLab to access the restroom or the break room. ... Everywhere I turned in DocLab, there was the monkey hanging from the noose.”

In a November 22, 2011 decision, an OWCP hearing representative affirmed the May 19, 2011 rescission decision. The hearing representative noted that in *Abe E. Scott*,⁷ the employee did not have to prove specific intent. Although the supervisor in *Scott* explained that he called all his apprentices “apes,” the Board found the remark derogatory on its face and a compensable employment factor. Similarly, the hearing representative found that a toy monkey hanging by its neck, whether by a noose or not, was sufficient to evoke imagery of racial discrimination and was, regardless of intent, clearly offensive. The hearing representative ruled that the offensive display, invoking imagery of racial discrimination, was not compensable because the record did not establish that it was directed at appellant.

On appeal, appellant's representative contends that the issue is not whether in fact there was harassment or discrimination but instead whether conditions of employment precipitated or aggravated appellant's disabling emotional reaction. What matters, he states, is that appellant and several other employees considered the hanging monkey as racially hostile and discriminatory.⁸

⁶ The decision cited generally to *Garry M. Carlo*, 47 ECAB 299 (1996) and *June A. Mesarick*, 41 ECAB 898 (1990).

⁷ 45 ECAB 164, 173 (1993).

⁸ The Board has no jurisdiction to review exhibits that counsel submitted from an Equal Employment Opportunity investigative file, as they were not before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁹ OWCP may review an award for or against payment of compensation at any time on its own motion or on application.¹⁰

The Board has upheld OWCP's authority to reopen a claim at any time on its own motion and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.¹¹ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.¹²

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP 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, which the Board may then review.¹³

ANALYSIS

Having accepted appellant's psychiatric injury claim, OWCP bears the burden of proof to support its rescission of that acceptance. Specifically, it bears the burden to establish that the accepted February 17, 2010 incident did not constitute a compensable factor of employment. The Board will therefore review OWCP's May 19 and November 22, 2011 decisions to determine whether OWCP presented sufficient evidence or rationale in support of its rescission.

OWCP twice found the February 17, 2010 incident at work to be a compensable factor of employment. The July 15, 2010 decision, which denied the claim on medical grounds, found that the incident occurred as alleged at work and arose in the course of his employment. In the November 4, 2010 decision accepting the claim, OWCP accepted as a work factor that appellant saw a stuffed monkey toy hanging from a noose on a bulletin board in his workplace on February 17, 2010.

OWCP rescission decisions are premised on the evidence received following November 4, 2010, specifically the investigative report of the OIG that was forwarded by the

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8128(a).

¹¹ *Eli Jacobs*, 32 ECAB 1147 (1981).

¹² *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

¹³ *Walter L. Jordan*, 57 ECAB 218 (2005).

employing establishment on January 11, 2011. The Board notes that the OIG report of investigation is the sole evidence relied upon by OWCP. The report states it was premised on an anonymous complaint of February 22, 2010 alleging racist conduct at appellant's workplace. The report "Synopsis" and "Details of Investigation" are so significantly redacted such that the interviewed employees are never clearly identified, except as to position held within the DocLab. The signature and identity of the special agent who prepared the report is also redacted. The investigative report does not provide any signed statements from any of the witnesses interviewed verifying the statements provided to the special agent. Left unredacted is the ultimate OIG finding, stating that "several DocLab employees were offended by the *perceived* symbolism associated with a monkey," but no evidence that it was intended as a racist display or symbol. (Emphasis added.) Based on this evidence, OWCP rescinded acceptance of appellant's claim.

The Board need not address, as argued by counsel on appeal, the adequacy of the rationale proffered by OWCP in the April 5, 2011 notice of proposed rescission, the May 19, 2011 decision or by the hearing representative's decision of November 22, 2011. The deficiency in this case is premised on the in adequacy of the OIG report submitted to the case record. The Board has set standards pertaining to the probative value of investigative reports as evidence under a FECA claim.¹⁴ In the absence of actual signed statements from the interviewed employees of DocLab, the case record on appeal lacks sufficient documentation as to the incident of February 17, 2010, the witnesses involved or the individual who investigated the matter and prepared the report. This deficiency was noted by the employer's January 11 and October 11, 2011 letters to OWCP: "the FBI has received and reviewed *a redacted version* of the October 25, 2010 report" from the Department of Justice OIG. (Emphasis added.) For this reason, the Board finds that OWCP did not meet its burden of proof to rescind acceptance of appellant's emotional condition claim.

CONCLUSION

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

¹⁴ Compare *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *S.G.*, Docket No. 11-942 (issued April 4, 2012) (M. Groom, Alternate Judge, concurring); *R.W.*, Docket No. 09-1607 (issued July 26, 2010); *Marvin L. Ralph*, 47 ECAB 626 (1996); *Eugene R. Anderson*, 40 ECAB 452 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board