

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

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J.C., Appellant)	
)	
and)	Docket No. 21-0755
)	Issued: December 20, 2021
U.S. POSTAL SERVICE, DALLAS NETWORK)	
DISTRIBUTION CENTER, Dallas, TX,)	
Employer)	
)	

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 5, 2021 appellant filed a timely appeal from a January 7, 2021 merit decision and February 9, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to rescind the acceptance of appellant's claim for interstitial pulmonary disease; and (2) whether OWCP properly denied

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 9, 2021 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.*

appellant's request for a prerecoupment hearing as it was made after the final overpayment decision.

FACTUAL HISTORY

On February 6, 2017 appellant, then a 57-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained diffuse scleroderma, complicated by interstitial lung disease and pulmonary hypertension, causally related to factors of his federal employment. He stopped work on February 10, 2016 and did not return. In a December 12, 2016 statement, appellant attributed his condition to exposure to asbestos-insulated pipes 8 to 10 hours daily for 19 years. OWCP accepted the claim for unspecified interstitial pulmonary disease. It paid appellant wage-loss compensation for disability from work from July 7 to October 13, 2018.

In a report dated November 18, 2016, Dr. Dhiman Basu, Board-certified in internal medicine and rheumatology, advised that he was treating appellant for diffuse scleroderma complicated by interstitial lung disease and pulmonary hypertension. He advised that diagnostic studies had revealed findings of pulmonary fibrosis related to either appellant's scleroderma or exposure to asbestos at work, and noted that asbestos exposure was "a known cause of pulmonary fibrosis."

In a report dated January 6, 2017, Dr. Rory Allen, an osteopath, diagnosed interstitial lung disease, pulmonary hypertension, and diffuse scleroderma. He noted that appellant had "prolonged exposure to asbestos at [appellant's] workplace" and opined that the diagnosed conditions resulted from his occupational exposure. Dr. Allen submitted progress reports describing his treatment of appellant in 2017 and 2018.

On March 30, 2017 appellant underwent a bilateral lung transplant. He subsequently was hospitalized for in 2017 and 2018 for stent removal and gastrostomy tube placement, infection, tachycardia, and acute kidney injury.

In a report dated January 5, 2018, Dr. Harsh Babbar, Board-certified in internal medicine and pulmonary disease, noted that appellant had worked in an old building with dust and open insulation. He discussed appellant's history of pulmonary fibrosis diagnosed in 2009 or 2010, scleroderma diagnosed in 2012, and a double lung transplant in 2017. Dr. Babbar diagnosed pulmonary fibrosis with usual interstitial pneumonia (UIP) pattern pathology with underlying scleroderma and a prior histoplasma infection after a lung transplant, pulmonary embolism, status post lung transplant, and progressive systemic sclerosis.

On April 2, 2018 Dr. Allen indicated that Dr. Babbar agreed that appellant had pulmonary fibrosis, scleroderma, and a lung transplant due to working in an old building around dust and insulation.³ He diagnosed interstitial lung disease, pulmonary hypertension, and a pulmonary embolism and found that his condition had occurred while he was "performing his normal work duties as a mail handler...."

³ Dr. Allen submitted progress reports dated May through July 2018.

On December 27, 2018 OWCP referred appellant to Dr. Ranjit R. Nair, a Board-certified internist, for a second opinion examination.

In a report dated February 13, 2019, Dr. Nair obtained a history of appellant experiencing a cough in 2012/2013 and discussed his diagnoses of scleroderma, scleroderma-associated interstitial lung disease, and pulmonary hypertension. He noted that he had undergone a double lung transplant in March 2017 and back surgeries in 2018. Dr. Nair indicated that appellant attributed his need for a lung transplant to exposure to pipes wrapped in asbestos. He diagnosed Raynaud's syndrome without gangrene, unspecified interstitial pulmonary disease, primary pulmonary hypertension, congestive heart failure, gastro-esophageal reflux disease without esophagitis, and localized scleroderma. Dr. Nair related, "[Appellant] claims that his exposure to asbestos is [what] caused his underlying interstitial lung disease. [He] states that he believes [that] his exposure to asbestos is the cause of his need for bilateral lung transplant." He opined that objective findings were consistent with interstitial lung disease due to scleroderma without connection to asbestos exposure, noting that he had a UIP pattern on evaluation of the chest. Dr. Nair asserted that there were no connection between his environmental exposure and his interstitial lung disease from scleroderma.

OWCP determined that a conflict in medical opinion existed regarding whether appellant sustained interstitial pulmonary disease causally related to his employment. It attempted to refer him for an impartial medical examination, but the physicians contacted to perform the evaluation declined the case.

On August 21, 2019 OWCP notified appellant of its proposed rescission of the acceptance of his claim as the medical evidence established that his interstitial lung disease was unrelated to his employment. It advised that Dr. Nair's report represented the weight of the evidence as he specialized in pulmonary disease. OWCP afforded appellant 30 days to respond to the proposed rescission.

In a progress report dated September 19, 2019, Dr. Allen evaluated appellant for chest pain and diagnosed interstitial pulmonary disease and a wedge compression fracture of unspecified thoracic vertebra.

On September 26, 2019 appellant's representative challenged the proposed rescission of acceptance. He submitted the April 2, 2018 report from Dr. Allen, an April 10, 2017 biopsy report, and an August 16, 2016 form report from Dr. Jessica Mullins, Board-certified in emergency medicine, who diagnosed pulmonary hypertension, scleroderma/interstitial lung disease, a history of asbestos exposure, and shortness of breath.

By decision dated November 7, 2019, OWCP rescinded its acceptance of appellant's claim for interstitial lung disease. It found that the opinion of Dr. Nair constituted the weight of the evidence.

On February 7, 2020 OWCP notified appellant of its preliminary overpayment determination that he had received a \$10,707.71 overpayment of compensation because it had paid him wage-loss compensation from July 7 through October 13, 2018, but had subsequently rescinded acceptance of his claim. It further advised him of its preliminary determination that he

was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. Additionally, it provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On March 6, 2020 appellant requested an extension of time to respond to the preliminary overpayment determination.

By decision dated April 28, 2020, OWCP finalized its preliminary overpayment determination that appellant had received a \$10,707.71 overpayment of compensation because it had paid him wage-loss compensation from July 7 to October 13, 2018, but subsequently had rescinded the acceptance of his claim. It found that he was without fault, but denied waiver of recovery of the overpayment, noting that he had not substantively responded to its preliminary overpayment determination. OWCP instructed appellant to forward the entire amount as repayment.

In an attending physician's report (Form CA-20) dated June 22, 2020, Dr. Allen diagnosed interstitial lung disease and pulmonary hypertension secondary to scleroderma.⁴ He checked a box marked "Yes" that the condition was caused or aggravated by employment, providing as a rationale that appellant was exposed to the material that had caused his condition while at work.

In an overpayment action request form dated May 20, 2020, appellant requested a prerecoupment hearing.

On September 25, 2020 appellant requested reconsideration of OWCP's November 7, 2019 decision. In an accompanying statement, appellant's representative requested that OWCP expand the acceptance of appellant's claim to include pulmonary fibrosis, a pulmonary embolism, lung transplant, and progressive systemic sclerosis. He submitted an undated report from Dr. Allen, who found that appellant had developed an occupational condition due to his employment duties.

By decision dated January 7, 2021, OWCP denied modification of its November 7, 2019 decision.

By decision dated February 9, 2021, OWCP denied appellant's request for a prerecoupment hearing as it was made after the final overpayment decision.

⁴ The record contains progress reports from Dr. Allen dated June through December 2020.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ It is well established that, once OWCP accepts a claim, it has the burden of proof justifying the termination or modification of compensation benefits. Its 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, OWCP is required to provide a clear explanation of the rationale for rescission.¹⁰

Section 8123 (a) of FECA provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹¹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹²

ANALYSIS -- ISSUE 1

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

OWCP determined that a conflict in medical opinion arose between Dr. Allen, appellant's physician, and Dr. Nair, a referral physician, regarding whether appellant sustained interstitial pulmonary disease as a result of employment-related asbestos exposure. It attempted to refer him for an impartial medical examiner, but was unable to find a physician to accept the referral. OWCP

⁵ *Supra* note 1.

⁶ 5 U.S.C. § 8128.

⁷ *D.R.*, Docket No. 16-0189 (issued September 2, 2016).

⁸ *See* 20 C.F.R. § 10.610.

⁹ *See D.V.*, Docket No. 16-0849 (issued March 6, 2017); *L.C.*, 58 ECAB 493 (2007).

¹⁰ *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *W.H.*, Docket No. 17-1390 (issued April 23, 2018).

¹¹ 5 U.S.C. § 8123(a).

¹² 20 C.F.R. § 10.321.

subsequently rescinded its acceptance of the claim, finding that the opinion of Dr. Nair was entitled to more weight than the opinion of Dr. Allen as he specialized in pulmonology.

In order to rescind acceptance of appellant's interstitial pulmonary disease, OWCP must show that the weight of the reliable evidence establishes that the acceptance of the claim was erroneous.¹³ It bears the burden of proof to rescind acceptance.¹⁴ The Board finds that an unresolved conflict in medical opinion exists between Dr. Nair and Dr. Allen regarding whether appellant sustained a pulmonary condition causally related to asbestos exposure at work. OWCP's inability to find an impartial medical examiner to evaluate appellant does not negate the existence of the conflict in medical opinion. Consequently, the Board finds that OWCP did not meet its burden of proof to rescind the acceptance of his claim for interstitial pulmonary disease. OWCP shall, therefore, reinstate appellant's benefits retroactively.¹⁵

CONCLUSION

The Board finds that OWCP has not met its burden of proof to rescind the acceptance of appellant's claim for interstitial pulmonary disease.¹⁶

¹³ See *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *A.W.*, Docket No. 11-1915 (issued August 21, 2012).

¹⁴ *D.V.*, *supra* note 9.

¹⁵ See *M.W.*, Docket No. 13-1447 (issued November 5, 2013).

¹⁶ In light of the Board's disposition of Issue 1, Issue 2 is moot.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2021 decision of the Office of Workers' Compensation Programs is reversed and the February 9, 2021 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: December 20, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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