

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

R.D., Appellant)	
)	
and)	Docket No. 22-1203
)	Issued: November 19, 2024
U.S. POSTAL SERVICE, CITY OF INDUSTRY)	
POST OFFICE, City of Industry, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 16, 2022 appellant, through counsel, filed a timely appeal from a July 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 an 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 The Board notes that following the July 28, 2022 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to rescind the acceptance of the claim for left ankle impingement; (2) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits with regard to the accepted left ankle sprain, effective March 16, 2021, causally related to the accepted April 17, 2020 employment injury; and (3) whether appellant has met her burden of proof to establish continuing disability or residuals with regard to the accepted left ankle sprain on or after March 16, 2021 causally related to the accepted April 17, 2020 employment injury.

FACTUAL HISTORY

On April 21, 2020 appellant, then a 29-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on April 17, 2020 he tripped over a curb and sprained his left ankle while in the performance of duty. He stopped work on April 20, 2020 and returned to light-duty work on June 29, 2020.

In a report dated June 3, 2020, Dr. Hosea Brown, III, a Board-certified internist, recounted appellant's history of injury on April 17, 2020. He reviewed a May 4, 2020 magnetic resonance imaging (MRI) scan finding partial tears of the anterior talofibular ligament (ATFL), calcaneofibular ligament (CFL), and posterior talofibular ligament (PTFL). The MRI scan also demonstrated tendinitis and tenosynovitis of the tibialis posterior and peroneus brevis tendons. Dr. Brown diagnosed multiple left ankle tears, temporary aggravation of the left ankle tendinitis, and left plantar fasciitis following trauma on April 17, 2020. He opined that these conditions were the direct result of the April 17, 2020 employment incident. Dr. Brown explained that appellant had a misstep and rolled his ankle violently stepping on the edge of a curb and that the increased biomechanical load due to the acute onset of the increased pressure on appellant's left ankle caused multiple tears and acute temporary aggravation of preexisting underlying left plantar fasciitis and ankle tendinitis.

Dr. Joline Tilly, a family medicine specialist, completed a form report on June 29, 2020 recounting the claimed April 27, 2020 employment incident, reviewing a June 18, 2020 left ankle MRI scan, and diagnosing left ankle tear, severe left ankle sprain, and temporary aggravation of plantar fasciitis of the left ankle and foot.

On December 21, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation as to whether appellant had sustained any diagnosed conditions causally related to the claimed April 17, 2020 employment incident.

In his January 18, 2021 report, Dr. Einbund reviewed the SOAF, medical records, and diagnostic studies. He diagnosed right ankle sprain and right ankle impingement. Dr. Einbund

³ 5 U.S.C. § 8101 *et seq.*

determined that appellant sustained an ankle sprain consistent with the claimed April 17, 2020 employment incident. He opined that the diagnosed right ankle impingement was not related to the employment injury, as it was a chronic condition with scarring over the anterolateral gutter. Dr. Einbund explained that the ankle impingement was not aggravated by the claimed employment incident and that his physical examination demonstrated no clinical signs of plantar fasciitis.

On February 2, 2021 OWCP requested a supplemental report from Dr. Einbund clarifying whether the right or left ankle was injured due to the claimed April 17, 2020 employment injury. He completed an additional report on February 5, 2021 and corrected his typographical errors to diagnose left ankle sprain, improved and left ankle impingement.

By decision dated March 4, 2021, OWCP accepted appellant's claim for left ankle sprain and left ankle impingement.

OWCP received an additional report dated May 28, 2020 from Dr. Chul Kim, a podiatrist, recounting the accepted April 17, 2020 employment injury and the MRI scan findings. Dr. Kim performed a physical examination and diagnosed left ankle ATFL and CFL tears; left ankle joint pain, left posterior tibial and peroneal tendinitis.

By decision dated March 15, 2021, OWCP "superseded" the March 4, 2021 decision to deny the claim for left ankle impingement and to accept sprain of the left ankle as resolved. It found that the medical evidence indicated that left ankle impingement was not causally related to the accepted employment injury and that appellant's left ankle sprain had resolved.

OWCP received additional form reports from Dr. Brown dated May 27, 2020 through March 10, 2021 repeating his earlier diagnoses. Dr. Brown found that appellant continued to exhibit an altered, painful, antalgic, ambulatory gait, restricted range of motion of the left ankle, and significant calcaneal motion tenderness in the left foot.

On May 3, 2021 appellant requested reconsideration of the March 15, 2021 decision. He provided April 27, 2021 reports from Dr. Brown. Dr. Brown asserted that appellant had sustained additional conditions causally related to his accepted April 17, 2020 employment injury including partial tears of the left CFL, PTFL, ATFL, tendinitis and tenosynovitis of the tibialis posterior and peroneus brevis tendons, and left plantar fasciitis. He opined that appellant's diagnosed conditions had not resolved. Dr. Brown reviewed Dr. Einbund's report and determined that Dr. Einbund had not adequately considered all of appellant's MRI scan findings in reaching his conclusions.

OWCP continued to receive additional evidence including a June 15, 2021 form report from Dr. Brown repeating his prior diagnoses.

On June 22, 2021 OWCP determined that a conflict in medical opinion existed between appellant's treating physician, Dr. Brown, and OWCP's second opinion physician, Dr. Einbund, regarding whether appellant's accepted left ankle conditions had resolved.

On January 27, 2022 OWCP referred appellant to Dr. Jeffrey Bernicker, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion.

Thereafter, OWCP received a July 26, 2021 form report from Dr. Tilly diagnosing left ankle sprain, partial tears of the left CFL, PTFL, and ATFL, left ankle tendinitis, left ankle impingement, temporary aggravation of the left plantar fasciitis and providing work restrictions.

In a report dated February 23, 2022 and signed March 10, 2022, Dr. Bernicker, serving as the impartial medical examiner (IME), reviewed the SOAF and medical records. He performed a physical examination, which he characterized as essentially normal, and diagnosed acute low-grade left ankle sprain/strain, resolved as of April 17, 2020. Dr. Bernicker explained that “[appellant’s] continued subjective complaints now almost two years following what was, by all accounts, a minor spraining injury . . . are inconsistent with the MRI findings as well as the physical examination performed of the ankle today (which was considered essentially normal).” He, therefore, agreed with Dr. Einbund in finding that the vast majority of minor ankle sprains would resolve within six to nine months, and concluded that appellant could return to his date-of-injury job.

By decision dated July 28, 2022, OWCP denied modification of its prior decision. It found that Dr. Bernicker’s report was entitled to the special weight of the medical evidence and resolved the conflict of medical opinion evidence.

LEGAL PRECEDENT -- ISSUE 1

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.⁴ 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 decision.⁵ 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.⁶

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.⁷

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁸ Probative and substantial positive evidence or

⁴ 5 U.S.C. § 8128.

⁵ See *S.C.*, Docket No. 19-1045 (issued July 24, 2020); *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.

⁶ *S.C.*, *id.*; *M.H.*, *id.*; *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

⁷ *M.H.*, *id.*; *V.R.*, Docket No. 18-1179 (issued June 11, 2019).

⁸ *M.H.*, *id.*; *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to rescind the acceptance of the claim for left ankle impingement.

OWCP failed to follow its established procedures for rescinding the acceptance of a condition.¹⁰ Its procedures provide that if, after proper development, it finds that the original decision was issued in error, the claims examiner must issue a proposed and final decision rescinding the original finding.¹¹ OWCP's 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. The evidence used to rescind the claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated and why the original decision is now being invalidated.¹²

OWCP failed to notify appellant that the accepted conditions of left ankle impingement was being rescinded or acknowledge that it held the burden of proof for rescinding accepted conditions. The Board thus finds that OWCP failed to follow its procedures to determine whether it should rescind acceptance of his claim. As it failed to provide a proposed decision rescinding the original finding, OWCP has not complied with its own procedures and thus, has not met its burden of proof to rescind acceptance of appellant's claim for left ankle impingement.¹³

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.¹⁴ After it has determined that, an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the

⁹ *M.H., id.*; *W.H., supra* note 5.

¹⁰ *R.B.*, Docket No. 22-0190 (issued June 21, 2022); *L.M.*, Docket No. 16-1464 (issued November 1, 2017).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.19b (February 2013).

¹² *Id.* at Chapter 2.1400.19(d); *see also D.S.*, Docket No. 17-0250 (issued August 29, 2017).

¹³ *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). *Ixtala Ccihuahatl*, 49 ECAB 427 (1998); *supra* note 11 at Chapter 2.1400.19.c (February 2013).

¹⁴ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

employment.¹⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁷ To terminate authorization for medical treatment, OWCP must establish that the appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, with regard to the accepted left ankle sprain, effective March 16, 2021, as he no longer had disability or residuals causally related to the accepted April 17, 2020 employment injury.

In his January 18, 2021 report, second opinion physician, Dr. Einbund, reviewed the SOAF, medical records, and diagnostic studies. He diagnosed "right" ankle sprain consistent with the claimed April 17, 2020 employment incident, but opined that it was a low-grade sprain which occurred eight months prior and that it had resolved. Dr. Einbund explained that his findings on examination were benign, and that appellant's current subjective complaints were no longer consistent with the prior objective diagnostic findings. On February 2, 2021 OWCP requested a supplemental report from Dr. Einbund clarifying whether the right or left ankle was injured due to the claimed April 17, 2020 employment injury. Dr. Einbund completed an additional report on February 5, 2021 and corrected his typographical errors to diagnose left ankle sprain, improved.

The Board finds that Dr. Einbund provided physical examination findings and a well-rationalized opinion based on the medical evidence regarding the status of appellant's accepted left ankle sprain. Accordingly, the Board finds that Dr. Einbund's second opinion represents the weight of the medical evidence in terminating appellant's wage-loss compensation and medical benefits.¹⁹

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits with regard to the accepted left ankle sprain, effective March 16, 2021, causally related to the accepted April 17, 2020 employment injury.

¹⁵ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹⁶ *V.L.*, Docket No. 24-0739 (issued August 26, 2024); *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹⁷ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁸ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁹ *M.H.*, Docket No. 24-0470 (issued July 25, 2024); *R.P.*, Docket No. 20-0891 (issued September 20, 2021); *K.W.*, *id.*; *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

LEGAL PRECEDENT -- ISSUE 3

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability or residuals, on or after that date, causally related to the accepted employment injury.²⁰ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.²¹

ANALYSIS -- ISSUE 3

The Board finds that appellant has not met his burden of proof to establish continuing disability or residuals with regard to the accepted left ankle sprain on or after March 16, 2021 causally related to the accepted April 17, 2020 employment injury.

Subsequent to OWCP's termination decision, appellant requested reconsideration and submitted additional evidence. On June 22, 2021 OWCP determined that a conflict in medical opinion existed between appellant's treating physician, Dr. Brown, and OWCP's second opinion physician, Dr. Einbund, regarding whether appellant's accepted left ankle conditions had resolved. On January 27, 2022 OWCP properly referred appellant to Dr. Bernicker for an impartial medical examination to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In a report dated February 23, 2022 and signed March 10, 2022, Dr. Bernicker, serving as the IME, reviewed the SOAF and medical records. He performed a physical examination, which he characterized as essentially normal, and diagnosed acute low-grade left ankle sprain/strain, resolved as of April 17, 2020. Dr. Bernicker explained that "[appellant's] continued subjective complaints now almost two years following what was, by all accounts, a minor spraining injury ... are inconsistent with the MRI findings as well as the physical examination performed of the ankle today (which was considered essentially normal)." He, therefore, agreed with Dr. Einbund in finding that the vast majority of minor ankle sprains would resolve within six to nine months, and concluded that appellant could return to his date-of-injury job. The Board finds that the IME's opinion is sufficiently rationalized and based on a proper factual and medical history such that his opinion is entitled to special weight in establishing that appellant had no continuing employment-related disability or residuals on or after March 16, 2021.²²

As the medical evidence of record is insufficient to establish continuing disability or residuals with regard to the accepted left ankle sprain on or after March 16, 2021 causally related to the accepted April 17, 2020 employment injury, the Board finds that appellant has not met his burden of proof.

²⁰ See *G.H.*, Docket No. 20-0892 (issued July 9, 2021); *J.R.*, Docket No. 20-0211 (issued November 5, 2020); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

²¹ *G.H.*, *id.*; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

²² See *E.A.*, Docket No. 18-1798 (issued December 31, 2019); *K.S.*, Docket No. 19-0082 (issued July 29, 2019).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to rescind the acceptance of the claim for left ankle impingement. The Board also finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits with regard to the accepted left ankle sprain, effective March 16, 2021, as he no longer had disability or residuals causally related to the accepted April 17, 2020 employment injury. The Board further finds that appellant has not met his burden of proof to establish continuing disability or residuals with regard to the accepted left ankle sprain on or after March 16, 2021 causally related to the accepted April 17, 2020 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2022 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part.

Issued: November 19, 2024
Washington, DC

Patricia H. Fitzgerald, 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