

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

----- )  
**D.H., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, LA GUARDIA AIRPORT,** )  
**East Elmhurst, NY, Employer** )  
----- )

**Docket No. 20-0275**  
**Issued: December 15, 2021**

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

*Case Submitted on the Record*

**ORDER REVERSING CASE**

Before:

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

On November 18, 2019 appellant, through counsel, filed a timely appeal from an October 7, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The Clerk of the Appellate Boards docketed the appeal as No. 20-0275.

On September 24, 2012 appellant, then a 49-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that at 11:30 a.m. on September 18, 2012 he sprained a trapezoid muscle when lifting a stack of bins while in the performance of duty. On the reverse side of the claim form, an employing establishment supervisor indicated that a surveillance

---

<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> The Board notes that following the October 7, 2019 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.*

digital video disc (DVD) was reviewed covering the time period 10:00 a.m. to 12:30 p.m. on the alleged date of injury, and that the injury described was not seen. On November 7, 2012 OWCP accepted that on September 18, 2012 appellant sustained sprains of the back, thoracic region, and shoulder/upper arm, rotator cuff.

By decision dated June 3, 2013, which incorporated an April 8, 2013 notice of proposed rescission, OWCP rescinded its acceptance of appellant's claim based on a surveillance DVD and the medical evidence of record. Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated September 30, 2013, the hearing representative affirmed the June 3, 2013 decision.<sup>3</sup>

Appellant appealed the June 3 and September 20, 2013 decisions to the Board. By order dated July 10, 2014, the Board found the case not in posture for decision because the surveillance DVD purported to cover appellant's work area on the alleged date of injury was not readable. The Board remanded the case to OWCP to furnish a readable DVD and for further reconstruction and assemblage deemed necessary, to be followed by an appropriate *de novo* decision.<sup>4</sup>

On August 13, 2014 OWCP requested that the employing establishment provide a readable DVD. By decision dated August 21, 2014, it again rescinded its acceptance of appellant's claim. Appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 17, 2015. By decision dated June 3, 2015, OWCP's hearing representative affirmed the August 21, 2014 decision, and appellant thereafter appealed to the Board. By order dated January 20, 2016, the Board again found the case not in posture for decision because the DVD provided was still not readable. The case was remanded by the Board for OWCP to obtain a readable DVD, to be followed by an appropriate *de novo* decision.<sup>5</sup>

On March 14, 2016 OWCP again requested that the employing establishment provide a readable surveillance DVD. By decision dated July 8, 2016, it again rescinded its acceptance of appellant's claim. Appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, that was held on March 15, 2017. On June 20, 2017 the employing establishment forwarded another surveillance DVD to OWCP. By decision dated September 5, 2017, the hearing representative affirmed the July 8, 2016 decision.

Appellant, through counsel, appealed to the Board. By order dated June 11, 2018, the Board again found the case not in posture for decision and remanded the case to OWCP because the surveillance DVD provided was still not readable. On remand, OWCP was to obtain a readable DVD, to be followed by an appropriate *de novo* decision.<sup>6</sup>

By decision dated May 15, 2019, OWCP again rescinded its acceptance of the claim. It noted that it received a clear copy of the surveillance DVD and reviewed two and a half hours of

---

<sup>3</sup> In the September 30, 2013 decision, the hearing representative also affirmed a March 18, 2013 decision denying three recurrence claims.

<sup>4</sup> *Order Remanding Case*, Docket No. 14-0244 (issued July 10, 2014).

<sup>5</sup> *Order Remanding Case*, Docket No. 15-1863 (issued January 20, 2016).

<sup>6</sup> *Order Remanding Case*, Docket No. 18-0121 (issued June 11, 2018).

footage between the hours of 10:00 a.m. to 12:30 p.m., which only showed appellant lifting five empty bins and placing them in a stack behind him. OWCP further noted that the video surveillance showed that appellant did not appear to be in distress and that he continued to work without apparent difficulty during the two-hour period. It indicated that the claim remained denied and the acceptance rescinded based on the factual component of fact of injury because the surveillance video did not establish that appellant had lifted an “extremely large” stack of bins. Appellant, through counsel, requested a telephonic hearing before a hearing representative of OWCP’s Branch of Hearings and Review, which was held on August 28, 2019. By decision dated October 7, 2019, an OWCP hearing representative modified OWCP’s May 15, 2019 decision to find the factual element of fact of injury was established as the surveillance DVD established that appellant lifted five empty bins and placed them on a stack behind him. The hearing representative also noted that the stack of five empty bins weighed approximately 9.5 pounds. The hearing representative, however, affirmed the rescission of the claim based on insufficient medical evidence to establish causal relationship.

The Board, having duly considered this matter, concludes that OWCP improperly rescinded the acceptance of appellant’s claim.

Section 8128 of the Federal Employees’ Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.<sup>7</sup> The Board has upheld OWCP’s authority to reopen a claim at any time on its own motion under section § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. OWCP’s burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.<sup>8</sup> OWCP’s hearing representative in the October 7, 2019 decision affirmed the rescission of appellant’s claim based on the prior medical evidence of record without clearly explaining, with rationale, why OWCP’s prior acceptance of appellant’s claim was erroneous. Therefore, the Board finds that OWCP improperly rescinded the acceptance of the claim.<sup>9</sup>

---

<sup>7</sup> 5 U.S.C. § 8128.

<sup>8</sup> See *C.H.*, Docket No. 20-0194 (issued August 26, 2021); *J.B.*, Docket No. 20-0597 (issued July 21, 2021); *D.P.*, Docket No. 18-1213 (issued July 30, 2020); *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *W.H.*, Docket No. 17-1390 (issued April 23, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

<sup>9</sup> See *D.P.*, *id.*

**IT IS HEREBY ORDERED THAT** the October 7, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 15, 2021

Washington, DC

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

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

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