

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

G.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Aurora, CO, Employer**

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**Docket No. 12-1387
Issued: March 5, 2013**

Appearances:

Ron Watson, for the appellant

No appearance, for the Director

Oral Argument February 6, 2013

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2012 appellant filed a timely appeal from a May 16, 2012 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.

ISSUE

The issue is whether appellant sustained a recurrence of total disability on April 22, 2010 when his modified position was withdrawn under the National Reassessment Process (NRP).

On appeal and at oral argument, appellant's representative asserted that appellant had residuals of the accepted injuries on April 22, 2010 when his modified position was withdrawn and he therefore established a recurrence of disability.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 30, 2009 appellant, then a 60-year-old letter carrier, filed an occupational disease claim, alleging that his job duties caused right upper extremity pain and numbness. He had stopped work on March 12, 2009. Appellant accepted a modified position on May 26, 2009. Following an initial denial by OWCP on July 1, 2009, on November 23, 2009 OWCP accepted that appellant sustained right upper extremity conditions of temporary aggravation of thoracic outlet syndrome, temporary aggravation of medial epicondylitis and temporary aggravation of ulnar neuropathy.²

On June 4, 2010 appellant filed a recurrence claim, stating that the recurrence of disability began on April 22, 2010 when his modified position was withdrawn. He indicated that his pay stopped on May 21, 2010. The employing establishment advised that appellant's position was withdrawn under NRP. Appellant thereafter filed Form CA-7 claims for compensation. In a May 11, 2010 duty status report, Dr. Christopher B. Ryan, an attending Board-certified physiatrist, advised that appellant continued to have employment-related residuals and could perform modified duty with physical restrictions.

By decision dated August 31, 2010, OWCP denied the recurrence claim. Appellant timely requested a hearing and submitted a September 7, 2010 report in which Dr. Ryan indicated that he began treating appellant in May 2009. Dr. Ryan diagnosed thoracic outlet syndrome, medial epicondylitis and ulnar neuropathy, and advised that, as long as appellant had been his patient, he had been partially disabled and had permanent restrictions of lifting no more than in a sedentary classification, no repetitive use of his upper extremities and no heavy gripping. He continued to submit reports, including work capacity evaluations, in which he reiterated appellant's diagnoses and restrictions.

In a November 17, 2011 decision, an OWCP hearing representative vacated the August 31, 2010 decision and remanded the case to OWCP for application of OWCP procedures developed for handling NRP claims, detailed in FECA Bulletin No. 09-05. In letters dated December 28, 2011 and March 15, 2012, OWCP asked the employing establishment and Dr. Ryan for information regarding appellant's job duties and physical condition respectively.

Dr. Ryan continued to submit reports. In April 3, 2012 correspondence, he advised that, although appellant's conditions were no longer active and disabling, this was because he was no longer performing any repetitive motion activities since he had been out of work for some time. Dr. Ryan indicated that if appellant returned to a repetitive motion job, he would most probably suffer a recurrence. He concluded that appellant could return to his modified position.

² This case, adjudicated under OWCP File No. xxxxxx700, includes four subsidiary files: File No. xxxxxx727, accepted for right elbow epicondylitis; File No. xxxxxx830, accepted for right elbow tendinitis; File No. xxxxxx669 accepted for right lateral epicondylitis and right sprain of elbow and forearm; and File No. xxxxxx304 accepted for right shoulder thoracic outlet syndrome. Under File No. xxxxxx992, not a subsidiary of this claim, by decision dated January 10, 2005, OWCP found that appellant's actual earnings represented his wage-earning capacity and reduced his compensation.

In a second-opinion evaluation dated April 23, 2012, Dr. John D. Douthit, a Board-certified orthopedic surgeon, noted appellant's complaints, his review of the medical record and physical examination findings. He diagnosed functional disorder with psychological overlay; history of epicondylitis, ulnar neuropathy and thoracic outlet syndrome, diagnosis unconfirmed; and arthrosis of right wrist from prior fracture. Dr. Douthit advised that on reviewing appellant's medical records and based on his physical examination, appellant had no objective physical findings to substantiate his complaints or that would preclude him from doing any kind of work at the postal service. He advised that appellant had reached maximum medical improvement. In an attached work capacity evaluation, Dr. Douthit indicated that appellant could return to work without restrictions.

In a merit decision dated May 16, 2012, OWCP denied that appellant sustained a recurrence of disability on April 22, 2010 on the grounds that the medical evidence did not establish that he continued to have an ongoing injury-related disability or residuals of the accepted condition.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee, who is disabled from the job that he or she held when injured because of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁵

In addition to the generally applicable provisions described above, OWCP has issued specific guidance for employees affected by NRP of the postal service. FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, FECA Bulletin No. 09-05 provides that if the claimant has been on light duty due to an injury-related condition without a loss of wage-earning capacity (LWEC) rating (or if the LWEC rating has been set

³ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁴ *Id.*

⁵ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

aside), payment for total wage loss should be made based on the Form CA-7 as long as the following described criteria are met. First, the current medical evidence within the file establishes that injury-related residual conditions continue. There must be sufficient medical evidence in the record within the last six months to make this determination. In addition, the evidence in the file must support that light duty is no longer available. There must be no indication that a retroactive LWEC determination should be made. Where a retroactive LWEC is considered, an OWCP district director must approve any such decision. In the event OWCP's claims examiner finds that the evidence in file is not sufficient to determine whether total wage-loss benefits should continue, current medical evidence should be requested from the claimant and the employer.⁶

ANALYSIS

The Board finds this case is not in posture for decision because a conflict in medical evidence has been created between the opinions of appellant's attending physician, Dr. Ryan, and that of OWCP's referral physician, Dr. Douthit, on the issue of whether appellant sustained a recurrence of disability when the employing establishment terminated his light-duty employment. The case must therefore be remanded to OWCP for further adjudication.

The facts in this case indicate that appellant's modified position was withdrawn under NRP on April 22, 2010 and he thereafter filed claims for compensation. As noted above, FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP and no wage-earning capacity decision is in place.⁷ In the instant case, on November 17, 2011 an OWCP hearing representative remanded the case to OWCP to apply FECA Bulletin No. 09-05. In addressing FECA Bulletin No. 09-05, in its May 16, 2012 decision, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Douthit who provided a second-opinion evaluation for OWCP. In an April 23, 2012 report, Dr. Douthit concluded that appellant had no objective physical findings to substantiate his complaints or that would preclude him from doing any kind of work at the employing establishment. Appellant, however, stopped work on April 22, 2010, two years before Dr. Douthit's examination. OWCP did not ask Dr. Douthit to provide an opinion regarding whether appellant had residuals of the accepted condition on April 22, 2010, when his light-duty job was withdrawn under NRP. In a duty status report dated May 11, 2010, appellant's attending physician, Dr. Ryan, advised that appellant continued to have residuals of the employment-related condition. Dr. Ryan thereafter submitted a number of reports and was consistent in his opinion that appellant had continued residuals and restrictions. While he noted on April 3, 2012 that appellant's condition was no longer active and disabling, he stated that this was because appellant was no longer performing any repetitive motion activities since he had been out of work for some time.

If there is disagreement between a physician who provides an opinion for OWCP and the employee's physician, OWCP will appoint a third physician who shall make an examination.⁸

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁷ *Id.*

⁸ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.⁹ The Board finds the opinions of Dr. Ryan and Dr. Douthit to be of equal weight as to whether appellant had residuals of the accepted conditions on April 22, 2012 when his modified position was withdrawn and whether these residuals continued. The Board will set aside the May 16, 2012 decision and remand the case to OWCP. On remand OWCP shall prepare an updated statement of accepted facts and a set of questions, instructing the referee physician to provide an opinion as to whether appellant had employment-related residuals on April 22, 2012 and for any period thereafter. After such further development as it deems necessary, OWCP shall issue a *de novo* decision on the merits of appellant's claim by following the appropriate criteria in FECA Bulletin No. 09-05.

CONCLUSION

The Board finds that this case is not in posture for decision as a conflict in medical evidence has been created regarding whether appellant sustained a recurrence of total disability on April 22, 2010.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion of the Board.

Issued: March 5, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ *Darlene R. Kennedy*, 57 ECAB 414 (2006).