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

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| **L.B., Appellant** | ) | |
| **and** | ) | **Docket No. 14-140** |
| | ) | **Issued: June 2, 2014** |
| **U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 22, 2013 appellant filed a timely appeal from a July 30, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

### ***ISSUE***

The issue is whether appellant has established a recurrence of disability beginning October 6, 2012 due to his accepted work injuries.

### ***FACTUAL HISTORY***

On December 19, 2007 appellant, then a 55-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an injury as a result of carrying a mail sack for his federal employment duties. By decisions dated February 21 and

[1] 5 U.S.C. § 8101 *et seq.*

December 11, 2008, OWCP accepted the claim for aggravation of right osteophyte and consequential pneumonia.

Appellant also filed another occupational disease claim, which OWCP accepted for sprain of neck, cervical disc herniations and authorized cervical fusion, claim number xxxxxx129. Claim number xxxxxx129 was combined with this claim number xxxxxx969, into master claim number xxxxxx969. On August 12, 2008 appellant underwent anterior cervical discectomy and fusion (ACDF) at C5-6 and C6-7. On May 15, 2011 he underwent ACDF at C4-5. Appellant was able to resume work in a modified position following his surgeries.[2]

In a January 31, 2012 medical report, Dr. Phillip A. Tibbs, appellant's treating physician and a Board-certified neurological surgeon, reported that appellant underwent C5-6 and C6-7 disc fusion in 2008. Appellant developed left arm and neck pain and a magnetic resonance imaging (MRI) scan revealed C4-5 herniated nucleus pulposus. In May 2011, he underwent C4-5 disc fusion. Based on appellant's functional capacity evaluation (FCE), Dr. Tibbs reported that appellant could return to work with a 20-pound weight lifting restriction. In a January 31, 2012 work capacity evaluation, he provided appellant with permanent work restrictions of no lifting, pulling or pushing over 20 pounds.

On February 9, 2012 appellant accepted a limited-duty position as a modified city carrier and returned to modified light duty on February 21, 2012. Limitations included no lifting trays or pulling mail from the case trays weighing over 20 pounds, no lifting/pushing/pulling over 20 pounds and no carrying a mail satchel weighing over 20 pounds. Appellant's restrictions were based on Dr. Tibbs' January 31, 2012 report and work capacity evaluation.

In a March 9, 2012 medical report, Dr. Laura G. Asher, a Doctor of Osteopathic Medicine, reported that she agreed with Dr. Tibbs 20-pound weight limitation and also recommended that appellant be accommodated with a slower performance time so that he would not reinjure himself.

In an August 3, 2012 medical report, Dr. Tibbs reported that appellant's work-related cervical disc herniation required two surgeries due to continued complaints of pain. He stated, "I have released [appellant] back to work activities, but he was to be restricted to a 12[-]pound lifting restriction and to avoid repetitive bending and twisting. Apparently, this was not respected and he has been doing unrestricted activities." Dr. Tibbs further stated that appellant had a progression of worsening right arm pain for the past four years. He noted that appellant's March 27, 2012 cervical spine MRI scan showed his prior anterior cervical fusions involving C4, C5, C6 and C7. Dr. Tibbs noted that the MRI scan did not show any new herniations that would require further surgery. He concluded that it would not be safe for appellant to return to his work activities without the advised restrictions. In a separate August 3, 2012 return to work clearance note, Dr. Tibbs provided restrictions of no overhead lifting over 15 pounds, no lifting from the floor over 20 pounds and no carrying more than 20 pounds.

[2] By decision dated October 13, 2009, OWCP granted appellant a schedule award claim for two percent permanent impairment of the right arm. The date of maximum medical improvement was noted as January 28, 2009.

In a September 21, 2012 medical report, Dr. Tibbs reported that appellant was highly motivated to work but did not have full functional capabilities for unrestricted work activities. He referenced his August 3, 2012 report, which provided lifting restrictions of 12 pounds with no repetitive bending or twisting which had not been restricted. Dr. Tibbs emphasized the need for these restrictions to avoid reoperation.

In an October 16, 2012 prescription note, Dr. James Chaney, Board-certified in internal medicine, reported that appellant could not resume work.

On October 29, 2012 appellant filed a claim for compensation (Form CA-7) for leave without pay for the period October 6, 2012 onward. The employing establishment controverted the claim that he was unable to work.

By letter dated November 5, 2012, OWCP noted receipt of appellant's claim for wage-loss compensation and informed him that it would be treated as a claim for a recurrence of disability. Appellant was advised of the medical and factual evidence required to support his recurrence claim and provided a questionnaire for completion.

By letter dated November 13, 2012, Dr. Chaney reported that he had been treating appellant for several years due to a work-related neck injury. He noted that a March 27, 2012 MRI scan of the cervical spine revealed abnormal findings and appellant was referred back to Dr. Tibbs. On August 3, 2012 Dr. Tibbs provided appellant with a 12-pound lifting restriction. Because modified work restrictions were not available for appellant, Dr. Chaney placed appellant off work on October 16, 2012.

On November 19, 2012 appellant responded to OWCP's questionnaire. He stated that he returned to modified duty on February 9, 2012 under his 20-pound lifting restrictions. However, due to policy changes and the handling of flat rate mail parcels, there were no visible weight limits on those parcels which appellant was required to retrieve from the hamper. Appellant further noted that driving his postal vehicle over pot holes and speed bumps was damaging to his head, neck and right arm. He stated that Dr. Chaney referred appellant back to Dr. Tibbs due to an abnormal March 27, 2012 MRI scan. On August 3, 2012 Dr. Tibbs changed appellant's weight restrictions from 20 pounds to 12 pounds. Appellant sought follow-up treatment with Dr. Chaney on October 16, 2012 and was placed off work due to increased pain and numbness until appellant could seek treatment with Dr. Tibbs on December 21, 2012.

In a November 28, 2012 OWCP Memorandum of Conference, OWCP requested the employing establishment clarify on whether appellant lifted packages weighing more than 20 pounds as a result of the flat rate parcels.

By letter dated December 11, 2012, the employing establishment reported that about 70 percent of the parcels appellant was required to deliver were not the flat rate parcels. Of the remaining 30 percent of the parcels, approximately one-third was the flat rate parcels. Appellant's supervisor would personally check the flat rate parcels to make sure that appellant was not given a parcel which weighed more than 20 pounds. This was done on a daily basis and if a parcel weighed more than 20 pounds, another employee would be instructed to deliver the item. Thus, appellant was never instructed to lift over his weight limitation.

In another letter dated December 21, 2012, the employing establishment reported that appellant never provided his supervisor with his physician's report, which decreased his lifting restriction to 12 pounds. The employing establishment stated that Dr. Tibbs' report, which provided a new 12-pound lifting restriction, was not received until appellant submitted his CA-7 form.

By decision dated December 31, 2012, OWCP denied appellant's claim for wage loss due to a recurrence of disability because the medical evidence failed to establish that he was disabled due to a material change/worsening of his accepted work-related conditions beginning October 6, 2012.

On January 11, 2013 appellant requested an oral hearing before the Branch of Hearings and Review.

In a February 8, 2013 medical report, Dr. Tibbs reported that appellant was treated for a work-related neck injury in 2008, which caused cervical disc herniations resulting in neck, shoulder and arm pain. Appellant underwent two different cervical fusions as a result of his work-related injuries. He returned to work under modified duty with a 20-pound lifting limit, which exacerbated his symptomology. Dr. Tibbs reported that he provided appellant with a new 12-pound lifting limit which was not respected by the employing establishment. As appellant's symptoms had become intolerable, Dr. Chaney restricted him from working on October 16, 2012. Dr. Tibbs opined that appellant was disabled from all work activities as a result of residuals from his previous work injuries which required extensive reconstructive surgery of the cervical spine. He noted that appellant continued to have pain in the workplace despite his restrictions and that the restrictions he specified were not enforced. Dr. Tibbs opined that appellant sustained an increase in disability due to limitation of range of motion of the neck, pain and residual weakness and numbness in the extremities.

By letters dated March 5 and April 24, 2013, the employing establishment controverted the claim stating that Dr. Tibbs' August 3, 2012 return to work clearance provided restrictions of no overhead lifting over 15 pounds, no lifting from the floor over 20 pounds and no carrying more than 20 pounds. It argued that it had followed his 20-pound work restrictions. The employing establishment further argued that appellant's condition of pain was subjective and not compensable to establish a recurrence of disability.

A hearing was held on May 15, 2013. Appellant argued that his claimed disability was based on his physician's direction as a result of the employing establishment's failure to adhere to his physical restrictions.

By decision dated July 30, 2013, the Branch of Hearings and Review affirmed the December 31, 2012 decision finding that appellant failed to establish a recurrence of disability on or after October 6, 2012. It noted that the evidence failed to establish a change in the nature and extent of his employment-related condition or a change in the nature and extent of his light-duty job requirements.

## ***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 resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.[3] This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force.[4]

Where an employee, who is disabled from the job he or she held when injured returns to a light-duty position or the medical evidence establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, 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] This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.[6] Where no such rationale is present, the medical evidence is of diminished probative value.[7]

## ***ANALYSIS***

OWCP accepted appellant's claim for aggravation of right osteophyte, consequential pneumonia, cervical disc herniations and cervical fusion. On October 29, 2012 appellant filed claim for wage-loss compensation beginning October 6, 2012 and onward. He has the burden to provide medical evidence establishing that he was disabled on October 6, 2012 due to a worsening of his accepted work-related conditions or a change in his job duties such that he was unable to perform his light-duty work.

The Board finds that appellant has not submitted medical evidence in support of a change in his injury-related condition on October 6, 2012. Dr. Tibbs' January 31, 2012 reports provided appellant with permanent work restrictions of no lifting, pulling or pushing over 20 pounds. On February 9, 2012 appellant accepted a limited-duty position as a modified city carrier based on

[3] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

[4] *Id.*

[5] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994).

[6] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[7] *Mary A. Ceglia*, Docket No. 04-113 (issued July 22, 2004).

Dr. Tibbs' 20-pound lifting restriction.[8] While he submitted narrative statements and testified that his condition had been aggravated by his work duties, he has not submitted a rationalized medical report consistent with his assertions.

Dr. Tibbs' reports do not contain a rationalized opinion explaining how appellant was disabled due to a worsening of his accepted work-related conditions on October 6, 2012. His February 8, 2012 report generally stated that appellant sustained an increase in disability due to limitation of range of motion of the neck, pain and residual weakness and numbness in the extremities yet failed to establish his disability for the specific period claimed. However, this report was not pertinent to the time period in question. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9] Dr. Tibbs' August 3, 2012 report stated that appellant had a progression of worsening right arm pain for the past four years. His February 8, 2013 report, noted that appellant's 20-pound lifting restriction exacerbated his symptomology and Dr. Chaney restricted him from working on October 16, 2012. However, an increase in pain alone does not constitute objective evidence of disability.[10] Moreover, the March 27, 2012 MRI scan of the cervical spine did not contain objective evidence of disability as Dr. Tibbs reported no new herniations that would require further surgery. His September 21, 2012 report reiterated his recommendation for a 12-pound lifting restriction in order to avoid reoperation. Dr. Tibbs provided appellant with new restrictions as a preventative measure and failed to identify any material change in his physical status.

In an October 16, 2012 prescription note, Dr. Chaney advised that appellant could not resume work. By letter dated November 13, 2012, he reported that a March 27, 2012 MRI scan of the cervical spine revealed abnormal findings and appellant was referred back to Dr. Tibbs. Because modified work restrictions were not available for appellant based on Dr. Tibbs' 12-pound lifting restriction, Dr. Chaney placed him off work beginning October 16, 2012. He provided no explanation as to why appellant's 20-pound lifting restriction should have been decreased to 12 pounds. Dr. Chaney's assertion that appellant had an abnormal MRI scan on March 27, 2012 contradicts Dr. Tibbs' findings, which found no new herniations which would require further surgery. Although he excused him from work beginning October 16, 2012, he did not provide any explanation on the cause of appellant's inability to work other than noting an "abnormal MRI [scan]."[11] As Dr. Chaney's report contains no rationale explaining why

[8] Appellant's limited-duty assignment provided restrictions of no lifting trays or pulling mail from the case trays weighing over 20 pounds, no lifting/pushing/pulling over 20 pounds and no carrying a mail satchel weighing over 20 pounds.

[9] *William A. Archer*, 55 ECAB 674, 679 (2004).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6.a(2) (June 2013).

[11] *A.N.*, Docket No. 10-1830 (issued June 14, 2011).

appellant was disabled beginning October 6, 2012, his opinion is insufficient to support that appellant sustained a worsening of his condition.[12]

Regarding the issue of whether appellant was allowed to work within his medical restrictions, Dr. Tibbs stated in his August 3, 2012 report that OWCP had not respected his 12-pound lifting restriction and appellant had been doing unrestricted activities. The Board notes that it appears Dr. Tibbs did not have a clear understanding of the work restrictions he imposed on appellant as he initially released him to full duty with a 20-pound lifting restriction and not a 12-pound lifting restriction as he indicated in his August 3, 2012 report. The record does not contain a report from Dr. Tibbs prior to August 3, 2012 where a 12-pound lifting restriction was recommended. Moreover, Dr. Tibbs incorrectly reported that appellant had been working with no restrictions as the record reflects that he remained in his limited-duty position with a 20-pound work restriction. Without a proper understanding of appellant's work duties and the restrictions imposed, Dr. Tibbs' opinion regarding appellant's claimed disability beginning October 6, 2012 is of limited probative value.[13]

The Board notes that in a subsequent February 8, 2013 report, Dr. Tibbs correctly identified that appellant worked under a 20-pound lifting restriction, which he later decreased to a 12-pound restriction. As Dr. Tibbs' August 3 and September 21, 2012 reports were not rationalized as to the need to change appellant's light-duty assignment, OWCP properly maintained appellant's work restrictions of no lifting over 20 pounds.[14]

The Board also notes that the restrictions imposed in Dr. Tibbs' August 3, 2012 medical report do not correspond to the restrictions provided in his August 3, 2012 return to work clearance note. The return to work note provided restrictions of no overhead lifting over 15 pounds, no lifting from the floor over 20 pounds and no carrying more than 20 pounds. The August 3, 2012 medical report provided restrictions of no lifting over 12 pounds and no repetitive bending or twisting. As Dr. Tibbs' work restrictions are inconsistent, even when issued on the same date, his reports fail to establish that appellant required a change in his light-duty assignment.

Dr. Tibbs did not accurately describe appellant's job duties or explain why his current condition would prevent him from performing those duties. He provided no rationale explaining that appellant's condition had worsened due to working outside his restrictions and failed to accurately identify how he was required to work outside of his restrictions. For all of these reasons, Dr. Tibbs' reports are of diminished probative value and are insufficient to establish appellant's claim.[15]

[12] *See Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

[13] In *Terry L. Hedman*, 38 ECAB 222 (1986), the Board stated that the employee must show 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. *See supra* note 10 at Chapter 2.1500.6 (June 2013). *See also* 20 C.F.R. §§ 10.104, 10.121.

[14] *Robert J. Lake*, Docket No. 01-397 (issued March 6, 2002).

[15] *D.C.*, Docket No. 08-2185 (issued April 10, 2009).

The Board notes that appellant has alleged that there was a change in his light-duty job as he was required to exceed his work restrictions. Appellant argued that he was lifting more than 20 pounds because many of the packages he handled were flat rate parcels which did not have visible weight limits. The employing establishment controverted this assertion stating that the flat rate parcels were weighed by appellant's supervisor on a daily basis to ensure that he received parcels weighing no more than 20 pounds and that appellant was not required to work outside of his restrictions. Given the above evidence, appellant has failed to establish that there was a change in the nature and extent of his light-duty job requirements.[16]

The Board accordingly finds that appellant did not meet his burden of proof in this case. Appellant did not establish a change in the nature and extent of the injury-related condition or a change in the nature and extent of his light-duty job requirements. OWCP properly denied the claim.

Appellant may submit new evidence or argument with a written request for reconsideration to the 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 appellant did not meet his burden of proof to establish a recurrence of total disability on or after October 6, 2012, causally related to his accepted employment injuries.

[16] *Supra* note 14.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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