

emergency room at the time of injury. Dr. Pira Maria Garibaldi, an attending physician specializing in emergency medicine, diagnosed a neck strain and right knee contusion.² OWCP assigned the claim File No. xxxxxx431.

On August 18, 2012 appellant accepted a modified position as a part-time flexible letter carrier for four hours a day, driving a vehicle up to three and a half hours and walking for half an hour each shift. He returned to work on August 20, 2012 and continued in the part-time light-duty position through December 20, 2012.

Dr. Laura Ross, an attending osteopathic physician Board-certified in orthopedic surgery, found appellant able to continue light-duty work through December 20, 2012 with intermittent absences. In an October 8, 2012 report, she diagnosed a right medial meniscal tear, right shoulder impingement syndrome, cervical sprain/strain, and right thumb tendinitis.³ Dr. Ross recommended right knee arthroscopy. In an October 31, 2012 note, she held appellant off work until November 12, 2012 related to the August 8, 2012 injuries. On November 12, 2012 Dr. Ross opined that the August 8, 2012 fall caused right rotator cuff tears with tendinosis, and impingement, in addition to internal derangement of the right knee.

In a December 20, 2012 note, Dr. Ross stated that appellant was “unable to work on Dec[ember] 18th due to his r[ight] knee (which is a work-related injury).” She prohibited him from driving and from reaching above shoulder level.

In January 16, 2013 reports, Dr. Frederic A. Kleinbart, an attending Board-certified orthopedic surgeon, found appellant able to work four hours a day light duty, with pushing, pulling, and lifting limited to 10 pounds. He prescribed physical therapy, and administered cortisone injections to the right knee.

On January 25, 2013 appellant filed a notice of recurrence of disability (Form CA-2a) asserting that the accepted conditions worsened on December 18, 2012 such that he was no longer able to perform his light-duty job. He worked part time through December 20, 2012, then stopped work.⁴

In a January 25, 2013 letter, OWCP advised appellant of the additional evidence needed to establish his claim for recurrence of disability, including a statement from his attending physician supporting a change in the nature, and extent of the accepted conditions, factual evidence confirming a “withdrawal of a modified assignment,” or factual evidence establishing a

² On August 24, 2012 Dr. Siddiq A. Faisal, an attending physician Board-certified in family practice, diagnosed a cervical strain, right thumb strain, and right knee contusion.

³ A September 6, 2012 magnetic resonance imaging (MRI) scan showed a partial rotator cuff tear of the right shoulder. A September 28, 2012 MRI scan of the right knee showed a complex medial meniscal surface tear, posterior cruciate ligament tear or synovitis, extensive patellar tendinosis, joint effusion, osteoarthritis, and chondromalacia.

⁴ OWCP paid intermittent wage-loss compensation on the supplemental rolls from November 3, 2012 to March 22, 2013.

change in his modified job duties such that they exceeded his physical limitations. Appellant was afforded 30 days to submit such evidence.⁵

Appellant submitted additional reports from Dr. Kleinbart dated from January 16 to February 18, 2013, restricting appellant to limited duty for four hours a day, with lifting limited to 20 pounds, and no working or reaching above shoulder level. Dr. Kleinbart diagnosed a right posterior cruciate ligament tear or sprain, right medial meniscal tear, degenerative arthritis of the right knee, a cervical strain, degenerative arthritis of the cervical spine, and possible bulging cervical discs.

In a February 14, 2013 report, Dr. Kleinbart noted treating appellant for left shoulder, left elbow, left wrist pain, and numbness accepted under File No. xxxxxx385, noting that this was a separate claim from the right lower extremity injury.⁶ On examination, he noted restricted motion of the left elbow, a mildly positive Tinel's sign at the cubital tunnel, slight grip weakness on the left, diffuse blunted sensation over the left thumb, index, and middle fingers, and degenerative cervical disc disease. Dr. Kleinbart reviewed a 2012 electromyogram of the left upper extremity showing severe carpal tunnel syndrome. He diagnosed degenerative arthritis of the cervical spine, cervical radiculopathy, left shoulder impingement, epicondylitis of the left elbow, and left carpal tunnel syndrome.

By decision dated March 4, 2013, OWCP denied appellant's claim for recurrence of disability commencing December 18, 2012 on the grounds that causal relationship was not established. It found that the medical evidence did not support that the accepted cervical sprain, and right knee contusion under File No. xxxxxx431 worsened spontaneously on December 18, 2012 such that he was disabled from his light-duty job.⁷ Counsel requested video hearing, scheduled for July 17, 2013.

In an April 3, 2013 report, Dr. Kleinbart noted that an MRI scan of the left shoulder performed the previous week showed a "high grade partial rotator cuff tear" and acromioclavicular arthritis. He recommended left shoulder arthroscopy. Dr. Kleinbart renewed prior work restrictions for the upper extremities, limiting fine manipulation to two hours a day,

⁵ On January 29, 2013 the employing establishment offered appellant a modified city carrier position, with required reaching, and climbing. In a February 20, 2013 letter, counsel submitted a copy of the January 29, 2013 employing establishment job offer, with annotations indicating that appellant could not climb, kneel, or reach above the shoulder as required. He asserted that the annotations were made by Dr. Kleinbart, and established that the offered position was not suitable work.

⁶ On May 2, 2012 appellant filed an occupational disease claim for conditions involving her left arm due to repetitive duties in claim File No. xxxxxx385. OWCP accepted this claim for aggravation of left carpal tunnel syndrome, left lateral epicondylitis, left shoulder sprain, and left forearm tendinitis. It also later authorized a left shoulder rotator cuff repair that was performed on May 6, 2013. This claim has been combined with the present claim File No. xxxxxx431. *See infra*.

⁷ OWCP offered appellant modified-duty positions on January 29 and April 28, 2013. Counsel asserted that both jobs required standing, grasping, and fine manipulation in excess of Dr. Kleinbart's restrictions regarding the left upper extremity and right lower extremity, limiting standing, and grasping to four hours a day, fine manipulation to two hours a day, and no reaching or working above shoulder level. On April 12, 2013 OWCP performed an informal loss of wage-earning capacity calculation, finding a 50 percent loss of wage-earning capacity as appellant was able to work four hours a day but was not working. It placed his case on the periodic rolls as of April 7, 2013.

simple grasping to four hours a day, and no reaching above the shoulder. Each of these limitations placed the activities below the number of hours required to perform the offered position. Appellant underwent left shoulder surgery on May 6, 2013. Dr. Kleinbart held him off work.

In a June 18, 2013 letter, OWCP noted that appellant underwent authorized left shoulder surgery on May 6, 2013 under File No. xxxxxx385. It would “begin compensation payments under case File No. [xxxxxx]385 for full disability.”⁸ Beginning on May 6, 2013 OWCP instructed appellant to submit all additional claims for compensation under File No. xxxxxx385. In a June 26, 2013 letter, it advised him that it had combined File No. xxxxxx431 with File No. xxxxxx385.

On July 15, 2013 Dr. Kleinbart performed a partial right medial meniscectomy, partial synovectomy, and excision of multiple loose bodies, authorized by OWCP. He held appellant off work through August 15, 2013. Appellant participated in physical therapy through September 2013.⁹

At the July 17, 2013 video hearing, appellant explained that the employing establishment withdrew his light-duty position on December 20, 2012 as Dr. Ross mistakenly indicated on a December 20, 2012 duty status report that he was unable to drive.¹⁰ Counsel asserted that the withdrawal of appellant’s modified light-duty job constituted a recurrence of disability. He contended that appellant was entitled to receive compensation for four hours a day from December 20, 2012 through May 6, 2013, the date of left shoulder surgery for accepted injuries sustained under File No. xxxxxx385.

By decision dated and finalized October 21, 2013, an OWCP hearing representative affirmed the March 4, 2013 denial of appellant’s claim for recurrence of disability. She found that he did not submit medical evidence explaining how and why the accepted neck strain or right knee contusion would disable him from work on and after December 18, 2012. The hearing representative noted that “Drs. Kleinbart and Ross failed to provide a rationalized opinion explaining how the claimed recurrence of December 18, 2012 [was] due to the August 8, 2012 work injury.” She did not address counsel’s argument regarding the withdrawal of light-duty work on December 20, 2012. Also, the hearing representative did not mention that OWCP had doubled appellant’s claims as of June 26, 2013, or refer to the left shoulder surgery.

LEGAL PRECEDENT

OWCP’s implementing regulations define a “recurrence of disability” as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical

⁸ Appellant was terminated from the employing establishment on June 2, 2013.

⁹ In September 13, 2013 reports, Dr. Rikin Patel, an attending osteopathic physician Board-certified in physiatry and pain management, noted administering an epidural steroid injection at C7-T1 to address ongoing cervical radiculopathy, and degenerative disc disease.

¹⁰ In a July 25, 2013 letter, Dr. Ross stated that on December 20, 2012, she intended the duty status report to indicate that appellant could drive no more than four hours a day using an automatic shift. The restriction should have remained in place through May 6, 2013.

condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹¹ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury is withdrawn or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.¹² Appellant has the burden of establishing that there was no medically appropriate light duty available for the claimed period.¹³

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, 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 job requirements.¹⁴ This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual, and medical history, concludes that the disabling condition is causally related to employment factors, and supports that conclusion with sound medical reasoning.¹⁵ An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on appellant's unsupported belief of causal relation.¹⁶

ANALYSIS

Under File No. xxxxxx431, OWCP accepted that appellant sustained a cervicothoracic strain, and a right knee contusion on August 8, 2012. Under File No. xxxxxx385, it accepted several left arm conditions and authorized a left rotator cuff tear. Following the August 8, 2012 injuries, appellant returned to light-duty work on August 20, 2012, continuing in the position through December 20, 2012.

Appellant claimed a recurrence of disability commencing on December 18, 2012, the date Dr. Ross, an attending Board-certified orthopedic surgeon, held him off work due to right knee symptoms related to the accepted injury. Dr. Kleinbart, an attending Board-certified orthopedic surgeon, followed appellant beginning in January 2013 for the right knee injury as well as the left shoulder injury. In a February 14, 2013 report, he described a left rotator cuff tear, as well as left elbow, and wrist conditions, related to File No. xxxxxx385. Dr. Kleinbart provided work restrictions against reaching and working above shoulder level, prolonged grasping, and fine manipulation, and lifting more than 20 pounds. OWCP denied the recurrence claim by decision

¹¹ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). See also *Philip L. Barnes*, 55 ECAB 426 (2004).

¹² *J.F.*, 58 ECAB 124 (2006).

¹³ *Id.*

¹⁴ *Albert C. Brown*, 52 ECAB 152 (2000); see also *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁵ *Ronald A. Eldridge*, 53 ECAB 218 (2001); see *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

¹⁶ *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

issued March 4, 2013, finding that there was insufficient medical rationale supporting a worsening of the accepted right knee contusion and cervical sprain.

On May 6, 2013 appellant underwent left shoulder surgery, approved by OWCP, for injuries sustained under File No. xxxxxx385. OWCP paid total disability compensation beginning on May 6, 2013. It doubled File No. xxxxxx385 with File No. xxxxxx431 effective June 26, 2013. Appellant then underwent authorized right knee surgery on July 15, 2013.

OWCP conducted a video hearing in the case on July 17, 2013 at which counsel asserted that the employing establishment withdrew appellant's light-duty position on December 20, 2012. Counsel contended that the withdrawal of light duty constituted a recurrence of total disability. By an October 21, 2013 decision, the hearing representative affirmed the March 4, 2013 denial of the recurrence claim, finding that the additional medical evidence did not establish a causal relationship between appellant's condition beginning December 18, 2012 and the accepted right knee contusion and cervical sprain. The Board finds, however, that the October 21, 2013 decision did not address the totality of the evidence and issues properly before him.

In the October 21, 2013 decision, the hearing representative found only that there was insufficient medical rationale to establish that the accepted right knee contusion and cervical sprain disabled appellant for work on and after December 18, 2012. However, she did not mention the torn left rotator cuff accepted under File No. xxxxxx385, or that File No. xxxxxx385 had been doubled with File No. xxxxxx431. The hearing representative did not address the upper extremity work limitations imposed by Dr. Kleinbart, restrictions relevant to the determination of appellant's fitness-for-duty for the claimed period. The Board finds that she should have addressed the evidence under File No. xxxxxx385, which had been combined with File No. xxxxxx431 on June 26, 2013, prior to the July 17, 2013 hearing. OWCP's June 26, 2013 letter explained that the claims had been doubled, and how compensation would be paid from May 6, 2013, the date of the left shoulder surgery under File No. xxxxxx385. As the hearing representative failed to address the accepted left shoulder injury and surgery, the case will be remanded to OWCP for additional development. On remand of the case, OWCP shall conduct appropriate development to determine if evidence submitted under either File No. xxxxxx385 or xxxxxx431 demonstrates that appellant sustained a recurrence of disability commencing December 18, 2012 as claimed. Following such development, it shall issue a *de novo* decision in the case to preserve appellant's appeal rights.

The Board notes that, pursuant to the July 17, 2013 hearing, and on appeal, counsel asserted that the employing establishment withdrew light duty on December 20, 2012. On appeal, counsel referred to the Board's decision in *Terry L. Hedman*¹⁷ and OWCP's procedures which define a recurrence of disability as the withdrawal of light duty.¹⁸ The hearing representative did not address this argument in the October 21, 2013 decision. However, as stated above, it is appellant's burden of proof to establish that light duty was in fact withdrawn.¹⁹

¹⁷ 38 ECAB 222 (1989).

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Case/Disability Management*, Chapter 2.1500.2(b) (June 2013).

¹⁹ *Supra* note 12.

While it is evident from the record that appellant stopped work on December 20, 2012, there is insufficient evidence that the work stoppage was due to a withdrawal of light duty and not the claimed worsening of an accepted medical condition. Counsel also contended that the medical evidence established a worsening of the accepted conditions on or about December 18, 2012. The case will be remanded to OWCP for additional development, including consideration of the medical evidence under both of appellant's claim files.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to OWCP for additional development, to be followed by issuance of a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2013 is set aside, and the case remanded to OWCP for additional development consistent with this decision and order.

Issued: August 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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