United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 17-0001**
	)	**Issued: August 2, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Newbury Park, CA, Employer	)	

Appearances:
Jeffery Scott Fultz, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 30, 2016 appellant, through her representative, filed a timely appeal from an April 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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 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] 5 U.S.C. § 8101 *et seq.*

[3] Appellant requested oral argument before the Board. By order dated April 18, 2017, the Board exercised its discretion and denied the request, finding that the issues could properly be adjudicated based on the evidence of record. *Order Denying Oral Argument*, Docket No. 17-0001 (issued April 18, 2017).

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing May 7, 2015, causally related to accepted bilateral shoulder conditions.

FACTUAL HISTORY

OWCP accepted that on or before November 12, 2012 appellant, then a 46-year-old city mail carrier in modified duty status,[4] performed repetitive upper extremity motions while casing and handling mail, resulting in an unspecified disorder of the bursae and tendons of both shoulders, bilateral shoulder tendinitis, and bilateral partial rotator cuff tears.

Appellant was first followed by Dr. Neil Ghodadra, an attending Board-certified surgeon, who submitted reports from September 9, 2011 to September 6, 2013 diagnosing bilateral shoulder impingement, snapping scapula syndrome, biceps tendinitis, acromioclavicular arthritis, rotator cuff tears, rotator cuff tendinitis, and impingement syndrome. Her mobility and symptoms improved with physical therapy and subacromial injections.[5] Dr. Ghodadra limited lifting to 10 pounds, and restricted repetitive upper extremity motion.

OWCP paid appellant wage-loss compensation for the period November 30, 2013 through March 8, 2014 as there was no work available within her medical restrictions.

On February 24, 2014 Dr. Walter A. Thomas, an attending Board-certified orthopedic surgeon, performed an authorized arthroscopic right rotator cuff repair with biceps tenodesis, labral debridement, glenohumeral synovectomy, and subacromial decompression. Appellant remained off work. She participated in physical therapy from February through September 2014. Appellant's postoperative course was complicated by a superficial venous thrombosis (SVT) in the right basilic vein above the elbow, which resolved by November 14, 2014.

On October 15, 2014 OWCP obtained a second opinion from Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, to determine whether appellant remained disabled from work due to the accepted right shoulder conditions. Dr. Ha'Eri reviewed the medical evidence of record and a statement of accepted facts (SOAF) provided by OWCP. On examination, he found restricted motion in all planes of the right shoulder and a positive impingement test. Dr. Ha'Eri diagnosed bilateral rotator cuff tendinopathy with a partial rotator cuff tear, and postsurgical adhesive capsulitis. He opined that appellant required closed manipulation of the right shoulder under anesthesia to address adhesive capsulitis, followed by a three-month recovery period.

[4] Appellant had been working six hours a day light duty since May 2010, when she underwent bilateral mastectomies. She had upper extremity lymphedema following the May 2010 surgery. In a January 18, 2013 report, Dr. John S. Link, an attending oncologist, noted following appellant for breast cancer since May 2010. Appellant developed lymphedema in the left arm due to cancer treatment, requiring intermittent follow up as necessary. Dr. Link opined that appellant's bilateral shoulder issues were "ligamental or capsular in nature" due to repetitive motion, and not to breast cancer or its treatment.

[5] A November 21, 2013 magnetic resonance imaging (MRI) scan of the right shoulder showed marked thickening of the supraspinatus and infraspinatus tendons, indicating severe tendinopathy, supraspinatus tendon tears, degenerative fraying of the superior and anterior glenoid labra, and acromioclavicular capsule hypertrophy.

Appellant could then return to full-time work with restrictions against reaching above the shoulder, operating a motor vehicle, and pulling, pushing, or lifting more than 10 pounds. Dr. Ha'Eri permitted appellant to perform repetitive upper extremity motions intermittently for up to four hours a day. In a December 30, 2014 addendum report, he opined that a December 15, 2014 arthrogram[6] showed postsurgical status, complicated by adhesive capsulitis.

Dr. Thomas held appellant off work through March 16, 2015, when he found appellant able to return to modified work. He restricted lifting to three pounds, no work at or above shoulder level, and no repetitive pushing or pulling with the right upper extremity.

On April 3, 2015 the employing establishment offered appellant a full-time modified position as a customer care agent in a call center. The job required occasional simple grasping, use of a computer mouse, and occasional use of a single finger on a computer keyboard. Appellant accepted the offer. She returned to work on April 6, 2015 in the offered customer care agent job. OWCP paid appellant wage-loss compensation for work absences related to physical therapy and medical appointments through April 22, 2015.

In an April 22, 2015 report, Dr. Thomas restricted appellant from repetitive pulling and pushing, work at or above the shoulder level, and working more than 40 hours a week. He also mandated a 10-minute break each hour.

Appellant stopped work on May 6, 2015. On May 15, 2015 she claimed wage-loss compensation (Form CA-7) for the period May 7 to 15, 2015. On May 29, 2015 appellant claimed wage-loss compensation (Form CA-7) for the period May 16 to 29, 2015. She filed subsequent claims for periods of disability beginning May 30, 2015.

In a June 8, 2015 letter, OWCP notified appellant of the evidence needed to establish her claim for wage-loss compensation from May 7 to 29, 2015 and continuing. It noted that appellant's modified position remained open and available to her during the period for which she claimed wage-loss compensation. OWCP afforded appellant 30 days to submit medical evidence from her attending physician explaining how and why the accepted shoulder conditions would disable her from performing her modified-duty position as of May 7, 2015.

In response, appellant provided May 7 and 12, and June 15, 2015 statements, asserting that her modified duties commencing April 6, 2015 caused increased swelling and pain in both shoulders and biceps, necessitating the 10-minute hourly break as prescribed by Dr. Thomas. She noted that on May 7, 2015, Supervisor T.P. directed employees not to stop answering the telephones due to "special projects." Appellant met with him after the meeting, noting that her 10-minute break each hour was recorded as "special project." T.P. met with another official, then instructed appellant to "clock out and go" as the employing establishment no longer had work available within her restrictions. Appellant also submitted additional medical evidence.

[6] A December 15, 2014 MRI scan arthrogram study of the right upper extremity showed postsurgical change of the supraspinatus tendon, a partial thickness tear of the infraspinatus tendon, and acromioclavicular joint hypertrophy status post subacromial decompression.

In a June 3, 2015 report, Dr. Thomas opined that appellant had attained maximum medical improvement, and would require permanent work restrictions against repetitive pulling and pushing with the right arm, no overhead work, and no lifting over five pounds with the right arm. He released appellant to modified duty on June 4, 2015, with lifting limited to three pounds, a 10-minute break each hour, and working for no more than 8 hours a day or 40 hours a week. Dr. Thomas repeated these restrictions on June 12, 19, and 29, 2015.

On July 1, 2015 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability commencing April 9, 2015 while performing modified work. She attributed an increase in pain and swelling in the right upper extremity to work duties performed after she returned to work on April 6, 2015 as a modifier customer care agent. Appellant stopped work on May 7, 2015.

In a July 2, 2015 letter, the employing establishment acknowledged that on May 7, 2015, "due to the change in [appellant's] restrictions," her supervisor "referred" appellant "back to her home District" to file a formal claim for recurrence of disability.

In a July 10, 2015 report, Dr. Thomas explained that he increased appellant's work restriction in April 2015 to include a 10-minute break each hour "to avoid aggravation of her injuries."

In a July 17, 2015 decision, OWCP denied appellant's claim for a recurrence of disability beginning May 7, 2015, finding that the medical evidence of record did not support an objective worsening of the accepted conditions, such that she could no longer perform the modified customer care agent position. It found that Dr. Thomas did not provide sufficient medical rationale explaining how and why the accepted bilateral shoulder bursitis, tendinitis, and partial rotator cuff tears disabled her from modified duty as of May 7, 2015.

In an August 12, 2015 letter, appellant, through her authorized representative, requested a review of the written record by an OWCP hearing representative. She submitted a July 14, 2015 report from Dr. Thomas, prescribing permanent work restrictions against repetitive pushing, pulling, grasping, or gripping with either upper extremity, overhead work with either arm, or lifting with either arm. Dr. Thomas limited repetitive upper extremity motions to 30 minutes an hour.

In an August 11, 2015 letter, the employing establishment notified appellant that it removed her from her bid position, "job #95842009," effective that day, because Dr. Thomas' July 14, 2015 permanent work restrictions precluded her from performing the essential functions of the job. Appellant would "be considered an unassigned regular letter carrier, "and would remain in her "current limited[-]duty assignment and schedule." She remained off work. Appellant continued to claim wage-loss compensation for total disability.

OWCP found a conflict of medical opinion between Dr. Ha'Eri, the second opinion physician, for the government, and Dr. Thomas, appellant's attending physician, regarding appellant's work restrictions. To resolve the conflict, it selected Dr. John Kaufman, a Board-certified orthopedic surgeon, as the impartial medical specialist. Dr. Kaufman provided a November 13, 2015 report, reviewing a SOAF and the medical evidence of record. On examination Dr. Kaufman found restricted right shoulder motion in all planes, diminished grip

strength on the right, and tenderness to palpation in both shoulders. He diagnosed bilateral rotator cuff tears and impingement syndrome, with postsurgical status on the right. Dr. Kaufman found that appellant had attained maximum medical improvement. He opined that appellant was able to return to restricted work as of March 1, 2015, with no overhead work, lifting, pulling, and pushing limited to seven pounds, and a 10-minute break each hour. Dr. Kaufman noted that these restrictions were wholly attributable to the accepted bilateral shoulder conditions.[7] In a February 3, 2016 supplemental report, he changed his opinion to find that appellant could resume full-time modified work as a customer care agent within the November 13, 2015 restrictions, but that he "believe[d] that [appellant] could work without the requirements of 10-minute breaks every hour."

The employing establishment noted on February 5, 2016 time analysis forms (Form CA-7a) and timekeeping forms, that there was no work available within appellant's medical restrictions. The time analysis forms contained the following annotation: "The 04/1/15 job offer was not rescinded."

On January 6, 2016 appellant's representative modified his request for a review of the written record to one for reconsideration. Appellant contended that the employing establishment withdrew her modified customer care agent position because of Dr. Thomas' April 22, 2015 work restrictions. She submitted additional evidence.

In a January 15 and 20, 2016 statements, appellant asserted that, when Supervisor T.P. sent her home on May 6, 2015, he made her turn in her security card that allowed her entry to her work station, and the headset she used to answer the telephone. She expressed willingness to resume work within Dr. Thomas' April 22, 2015 restrictions, including the 10-minute hourly break. Appellant contended that on January 19, 2016 an employing establishment official explained that, because she was sent out of the call center in May 2015, her position would have been filled immediately, preventing her from returning to work.

The employing establishment contended in a March 8, 2016 letter that on May 7, 2015, due to "the increase in restrictions," appellant was "simply sent back to her original district to provide clarification of her new alleged increase in restrictions and to submit the appropriate paperwork for a possible recurrence." The employing establishment explained that the new restrictions appellant submitted on May 7, 2015 "provided an increase or worsening of her condition," placing management on notice that she was no longer able to perform the customer care agent position. However, as Dr. Kaufman opined that appellant no longer required a 10-minute hourly break, she could resume work as a modified customer care agent.

On March 28, 2016 the employing establishment offered appellant a modified city carrier position, sorting bundles of mail. The physical duties included sitting and simple grasping.

[7] By letter dated December 2, 2015, OWCP notified appellant that the customer care agent position offered to her on April 3, 2015, which she performed through May 6, 2015, was suitable work within her medical restrictions, based on the opinion of Dr. Kaufman. It advised appellant of the penalty provisions under FECA for refusing an offer of suitable work. OWCP afforded appellant 30 days to submit additional evidence or argument as to why she could not work as a modified customer care agent. In a January 21, 2016 letter, it rescinded the December 2, 2015 notice, pending clarification of appellant's work restrictions.

Appellant would have a 10-minute break each "hour for upper extremity." She accepted the job offer on March 28, 2016.

By decision dated April 5, 2016, OWCP denied modification of the July 17, 2015 decision, finding that the additional evidence submitted on reconsideration did not establish that she was disabled from performing the modified customer care agent position from May 7, 2015 onward due to the accepted bilateral shoulder conditions. In reaching this determination, it noted that appellant's position "was removed" on May 7, 2015 because Dr. Thomas increased appellant's occupationally-related work restrictions as of April 22, 2015. OWCP went on to say, "However, evidence of record proves that the claimant was in fact able to perform less restricted duties than what Dr. Thomas actually recommended." Additionally, it noted that the employing establishment confirmed on December 18, 2015 that the position remained available to her since April 3, 2015. OWCP accorded the special weight of the medical evidence to Dr. Kaufman as the impartial medical examiner.

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 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."[8]

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.[9] 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.[10] An award of compensation may not be based on surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.[11]

The term recurrence of disability also means an inability to work when a light-duty assignment 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

[8] 20 CFR § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.b (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

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

[10] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[11] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

requirements of such an assignment are altered so that they exceed his or her established physical limitations.[12] It is appellant's burden of proof to establish that light duty has, in fact, been withdrawn.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing May 7, 2015.

OWCP accepted that appellant sustained bilateral shoulder conditions in the performance of duty. It authorized arthroscopic right rotator cuff repair, performed on February 24, 2014 by Dr. Thomas, an attending Board-certified orthopedic surgeon.

Appellant returned to modified duty on April 6, 2015 as a customer care agent, answering telephones and using a computer keyboard and mouse. On April 22, 2015 Dr. Thomas prescribed additional work restrictions, including a 10-minute rest break each hour.

On May 7, 2015 appellant advised Supervisor T.P. of her increased work restrictions including the necessity of a 10-minute rest break. She asserted that T.P. then withdrew her modified-duty position, confiscated her workplace identification badge, building security pass, and telephone headset, and sent her home as she was no longer medically able to perform the job. Appellant contended that an employing establishment official informed her that her modified position terminated when she was ordered to leave the call center, as her job would have been filled immediately.

Appellant filed a notice of recurrence (Form CA-2a) claiming disability commencing May 7, 2015 while on modified duty. OWCP denied appellant's claim for recurrence of disability by decisions dated July 17, 2015 and April 5, 2016, finding that the medical evidence did not establish total disability for work from May 7, 2015 onward.

In support of her claim, appellant reports dated from June 2 to July 14, 2015 from Dr. Thomas, a Board-certified orthopedic surgeon, prescribing additional work restrictions. Although he commented in a July 10, 2015 that these restrictions were "to avoid aggravation of her injuries," Dr. Thomas did not opine that appellant's condition had worsened such that she could no longer perform her modified customer care agent position.

Additionally, Dr. Kaufman, a Board-certified orthopedic surgeon and impartial medical specialist, provided November 3, 2015 and February 3, 2016 reports, finding that appellant remained physically able to perform her modified job. The Board therefore finds that the medical evidence of record does not support a spontaneous worsening of the accepted conditions

[12] 20 CFR § 10.5(x).

[13] *J.F.*, 58 ECAB 124 (2006).

commencing May 7, 2015, such that appellant would not have been able to continue in her assigned modified-duty position.[14]

The Board further finds that appellant did not meet her burden of proof to establish a recurrence of disability based on the withdrawal of her modified position. The employing establishment submitted a July 2, 2015 letter in which it confirmed that on May 7, 2015 Supervisor T.P. ordered appellant to leave the call center due to the change in her work restrictions, and referred her to her "home" district office to file a claim for recurrence of disability. In a March 8, 2016 letter, the employing establishment reiterated that on May 7, 2015 it sent her to a district office to file a recurrence claim. However, there is no indication that the employing establishment withdrew appellant's modified position.

The employing establishment advised on appellant's time analysis forms, as well as OWCP directly that appellant's job offer was not rescinded and had not been rescinded since April 1, 2015. Also, the Board notes that the employing establishment explained that, effective August 11, 2015, appellant would remain in her current modified assignment and schedule because her original bid position had been withdrawn. This is persuasive evidence that the modified customer care agent position remained open and available to appellant.

The Board notes that, while OWCP mentioned in its April 5, 2016 decision that appellant's light-duty position "was removed" effective May 7, 2015, it did not specify the evidence on which it based this conclusion and there is no evidence of record to establish that the employing establishment actually withdrew appellant's light-duty position.

As noted above, it is appellant's burden of proof to establish that the employing establishment withdrew the modified position.[15] In this case, the employing establishment's letters demonstrate that appellant was instructed to file a claim for recurrence of disability, but that her modified job remained open and available to her. There is no indication that OWCP withdrew her position. Therefore, appellant has not established a recurrence of disability in this respect.

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 appellant has not met her burden of proof to establish a recurrence of total disability, commencing May 7, 2015, causally related to her accepted bilateral shoulder conditions.

[14] *Ronald A. Eldridge*, *supra* note 10.

[15] *J.F.*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2016 is affirmed.[16]

Issued: August 2, 2018
Washington, DC

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

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

[16] Colleen Duffy Kiko, Judge, participated in the preparation of the decision, but was no longer a member of the Board after December 11, 2017.