

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

JESSIE L. OWENS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Las Vegas, NV, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1278
Issued: March 2, 2006**

Appearances:
Kim Shugars, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 23, 2005 appellant filed a timely appeal of the January 19, 2005 merit decision of the Office of Workers' Compensation Programs which denied wage-loss compensation after July 7, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective July 7, 2003.

FACTUAL HISTORY

Appellant, a 48-year-old letter carrier, was involved in an employment-related motor vehicle accident on October 12, 2000. The Office accepted the claim for right wrist strain, right knee strain, cervical and lumbosacral strains, herniated cervical discs and bilateral shoulder impingement syndrome.

On January 15, 2002 Dr. Mark B. Kabins, a Board-certified orthopedic surgeon, performed an anterior discectomy at C5-6 and C6-7, with interbody fusion and instrumentation. Following surgery he referred appellant to another specialist to address his ongoing complaints of shoulder pain. Dr. Mary Ann Shannon, a Board-certified orthopedic surgeon, first examined appellant on February 25, 2002 and diagnosed employment-related bilateral impingement syndrome and partial rotator cuff tears. On March 6, 2003 she performed left shoulder arthroscopy with debridement of glenohumeral joint, partial torn rotator cuff repair and subacromial decompression with distal clavicle resection. Dr. Shannon estimated that appellant would be totally disabled for a period of six months following the March 6, 2003 surgery.¹

The Office placed appellant on the periodic compensation rolls effective March 6, 2003. In an April 10, 2003 letter, the Office advised him that he would continue to receive wage-loss compensation at the current rate every four weeks until he either returned to work or the medical evidence established that he was no longer disabled from work, whichever occurred first.

The record reveals that appellant came under surveillance intermittently from September 23, 2002 to May 12, 2003 and approximately four hours of videotape of him performing various work on automobiles. On two occasions in September and October 2002, appellant waxed, polished and buffed his car. Following his March 6, 2003 left shoulder surgery, the employing establishment videotaped him performing detail work and other automotive repairs on four occasions between April 25 and May 8, 2003. Copies of the surveillance videotape were submitted to appellant's physicians for their review. Dr. Shannon and Dr. Kabins provided work ability evaluations dated May 23 and 24, 2003, respectively. Based on their review of the videotape, each doctor indicated that appellant was able to resume his regular duties, eight hours per day. Dr. Kabins' evaluation included the notation "no restrictions." The only restriction identified by Dr. Shannon was a lifting limitation of 50 to 75 pounds. The employing establishment forwarded a copy of the May 30, 2003 investigative memorandum to the Office.

Dr. Shannon examined appellant on June 11, 2003. Appellant reported ongoing pain in the right shoulder with any type of reaching activity and in the left acromioclavicular (AC) joint. Physical examination revealed mild tenderness of the left AC joint. Dr. Shannon indicated that recent x-rays revealed that the March 6, 2003 planning of the AC joint appeared to be in good alignment, however, there was a minimal amount of distal clavicle present radiographically. She also noted that appellant's right shoulder continued to be symptomatic. Dr. Shannon diagnosed right shoulder impingement syndrome and recommended right shoulder arthroscopy. She also indicated that appellant's left shoulder symptoms appeared to be a residual of the prior surgery and recommended a left shoulder computerized tomography (CT) scan to rule out residual distal clavicle. Dr. Shannon indicated that appellant could be released to regular duty with respect to the left shoulder. She also noted that, pending surgery, he could return to full duty with respect to his right shoulder.

On June 23, 2003 the employing establishment submitted a report of termination of disability (Form CA-3), advising the Office that appellant had been released to return to full-

¹ Appellant worked part-time, limited duty from June 17, 2002 until he underwent surgery on March 6, 2003.

time, regular duty as a letter carrier effective May 24, 2004, but he had not yet reported for work. The employing establishment provided copies of the May 23 and 24, 2003 reports from Dr. Shannon and Dr. Kabins. A June 27, 2003 telephone call log reflects a discussion concerning the surveillance videotape and appellant's release to regular duty. His supervisor was to call him the following Monday with instructions to return to regular-duty work. Also included is a handwritten notation that appellant was scheduled to meet with the labor relations office on June 30, 2003 to address his concerns and discuss a date for return to full duty.

The employing establishment advised appellant on June 27, 2003 that he should report for duty. The letter explained that recent reports from Dr. Shannon and Dr. Kabins indicated that he was capable of performing his original bid position as a letter carrier with no restriction. The employing establishment instructed appellant to report for duty on July 3, 2003. It attached information concerning his salary, work schedule, work location and bid route.

Appellant saw Dr. Shannon again on July 16, 2003. She noted that she had previously reviewed tapes of him doing activities such as maintaining his vehicles and had been asked whether appellant could have been placed in light-duty status during the initial two months following surgery. Her response at the time was that he could have been placed in some type of light-duty activity that did not require overhead activity. Dr. Shannon noted current subjective complaints of pain and clicking in the left shoulder. She commented that her request for approval of a left shoulder CT scan was still pending. Dr. Shannon also indicated that right shoulder surgery had not yet been approved. Appellant's physical examination revealed tenderness over the left AC joint and clicking with range of motion over the AC joint and possibly the posterior scapula. Dr. Shannon reported good rotational strength and minimal discomfort over the biceps tendon. She also noted that impingement sign was negative on the left, but there was mild ongoing impingement on the right. Dr. Shannon diagnosed ongoing impingement syndrome of the right shoulder and what appeared to be some residual distal clavicle on the left.

Dr. Shannon recommended a return to work with regular duty on the left and minimal overhead activity on the right shoulder. She indicated that appellant would require rest periods with overhead activity on the right shoulder. Dr. Shannon indicated that he may require left distal clavicle resection. She provided a July 16, 2003 duty status report (Form CA-17), noting that, while appellant was able to return to work, he could not perform his regular duties. The noted restrictions included four hours driving and four hours reaching above shoulder with rest periods.

On July 17, 2003 the employing establishment advised the Office that appellant had reported for duty as a letter carrier on July 7, 2003. The employing establishment forwarded a copy of Dr. Shannon's July 16, 2003 Form CA-17. On July 22, 2003 the employing establishment resubmitted its previous Form CA-3, dated June 13, 2003. The employing establishment reiterated its request that the Office terminate appellant's wage-loss compensation.

The Office removed appellant from the periodic compensation rolls as of July 3, 2003.

On May 5, 2004 appellant filed a claim (Form CA-7), for compensation for lost wages for the period March 24, 2003 to the present. He noted that the employing establishment would not employ him or issue him a job offer.

On June 16, 2004 the Office returned the claim form to appellant noting that he must first submit the Form CA-7 to his employer. It noted that Dr. Kabins released him to full duty effective May 24, 2003 and that the employing establishment previously advised him to report for duty on July 3, 2003. The Office advised appellant that, if he had not reported for duty as instructed, he should provide his reason for not reporting for duty. The Office explained that, if appellant was claiming temporary total disability, he would need to provide a comprehensive medical report from Dr. Kabins explaining a material change in his medical condition that rendered him unable to work.

Appellant responded that, while Dr. Kabins treated him for his neck and back injuries, Dr. Shannon treated him for his bilateral shoulder condition. He stated that, because Dr. Kabins did not treat him with respect to his shoulder injuries, he could not have released him to return to work regarding those conditions. Appellant provided several reports from Dr. Shannon, including her July 16, 2003 report. He contended that the employing establishment had not offered him a position suitable for his shoulder condition.

On September 9, 2004 the employing establishment provided the Office with a copy of an April 2, 2004 arbitrator's decision which upheld appellant's suspension and subsequent removal from service for misrepresentation of his duty status. The decision revealed that he had not resumed his letter carrier duties on July 7, 2003. Rather, the employing establishment immediately placed appellant off-duty pending investigation into the alleged misrepresentation of his physical condition. He was later issued a notice of proposed removal for misrepresentation of duty status. The removal action was to become effective on or about September 22, 2003. The arbitrator found just cause for the emergency suspension and appellant's subsequent removal for failure to honestly report his ability to work.

On October 14, 2004 the Office requested additional information from Dr. Shannon. She was asked to explain her change of opinion regarding appellant's work restrictions from May 23 to July 16, 2003. The Office afforded Dr. Shannon 30 days to respond. Dr. Shannon did not respond to the Office's October 14, 2004 request.

In a decision dated January 19, 2005, the Office paid compensation for wage loss through July 6, 2003. However, it denied wage-loss compensation on or after July 7, 2003 because the evidence did not support his claimed disability. The Office explained that appellant had been released to resume his regular duties in May 2003 and the employing establishment notified the Office that he returned to work July 7, 2003. The employing establishment placed appellant on leave effective July 7, 2003 and he remained in that status until his termination as a letter carrier. The Office also noted that Dr. Shannon did not respond to its request for clarification regarding the July 16, 2003 work restrictions she imposed.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³

The Office will reduce or terminate compensation when an employee has returned to work.⁴ Generally, the Office can meet its burden to terminate compensation by showing that the employee returned to work.⁵ This burden is satisfied even if the work is light duty rather than the date-of-injury position, as long as the employee does not earn less than he earned before the employment injury.⁶ A short-lived and unsuccessful return to duty, however, does not automatically discharge the Office's burden.⁷

After a proper termination of benefits, the burden of proof shifts to the employee to support his or her claim of employment-related continuing disability.⁸

ANALYSIS

The Office placed appellant on the periodic compensation rolls following his March 6, 2003 left shoulder arthroscopy. Dr. Shannon estimated that he would be totally disabled for a period of six months following surgery. In its April 10, 2003 correspondence, the Office advised appellant that, while on the periodic compensation rolls, he would continue to receive wage-loss compensation at the current rate every four weeks until he either returned to work or the medical evidence established that he was no longer disabled from work, whichever occurred first.

² *Curtis Hall*, 45 ECAB 316 (1994).

³ 20 C.F.R. § 10.503(a), (b) (1999); *Jason C. Armstrong*, 40 ECAB 907 (1989). Where the evidence establishes that compensation should either be reduced or terminated, the Office will provide appellant with written notice of the proposed action and allow him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation. Payment of compensation will continue until any evidence or argument submitted has been reviewed and an appropriate decision has been issued or until 30 days have elapsed if no additional evidence or argument is submitted. 20 C.F.R. § 10.540(a) (1999). However, prior written notice will not be provided where appellant has no reasonable basis to expect that payment of compensation will continue, such as when the Office either reduces or terminates compensation upon an employee's return to work. 20 C.F.R. § 10.540(b) (1999).

⁴ 20 C.F.R. § 10.503(d) (1999).

⁵ *Fred Reese*, 56 ECAB ____ (Docket No. 05-586, issued June 9, 2005).

⁶ *Id.*

⁷ *Id.*; *Janice F. Migut*, 50 ECAB 166 (1998) (where appellant returned to work for only two days, the burden remained on the Office to justify termination of benefits).

⁸ *John F. Glynn*, 53 ECAB 562, 566 (2002).

On July 17, 2003 the employing establishment advised the Office that appellant had reported for duty as a letter carrier on July 7, 2003.

The Board initially notes that the Office was not required to submit a wage-loss compensation pretermination notice to appellant following his return to work on July 7, 2003. According to the Federal (FECA) Procedure Manual, a pretermination notice must be provided in cases where the Office has accepted appellant's claim, unless termination of wage loss is based on the death of the claimant, the claimant has returned to work or where the claimant has based on the death of the claimant, the claimant has returned to work or where the claimant has engaged in certain activities which result in a forfeiture or suspension of compensation.⁹ As appellant returned to work on July 7, 2003 a pretermination notice was not necessary.¹⁰

However, the Board finds that the Office did not meet its burden of proof to terminate wage-loss compensation as of July 7, 2003. The medical evidence of record is not conclusive as to appellant's ability to perform the regular duties of his position as of that date.

Dr. Kabins and Dr. Shannon both reviewed the surveillance videotape in May 2003 and based upon this information they released appellant to return to regular duty, eight hours per day. He contends that his ongoing right shoulder condition precluded him from performing his regular duties.

In her May 23, 2003 work release, Dr. Shannon did not distinguish between appellant's left or right shoulder. When she examined him on June 11, 2003 Dr. Shannon noted residual symptoms in the left AC joint and ongoing right shoulder impingement syndrome. At that time, she recommended arthroscopic surgery for the right shoulder and a left shoulder CT scan to rule out residual distal clavicle. According to Dr. Shannon, appellant was still capable of performing full-duty pending right shoulder arthroscopy. When she next examined him on July 16, 2003 Dr. Shannon recommended a return to work with regular duty regarding the left shoulder and minimal overhead activity with regard to appellant's right shoulder. Dr. Shannon also noted that he would require rest periods with overhead activity involving the right shoulder. In the accompanying Form CA-17, she noted that, while appellant was able to return to work, he could not perform his regular duties. Dr. Shannon restricted him to four hours driving and four hours reaching above shoulder with rest periods.

The Office asked Dr. Shannon for clarification regarding the July 16, 2003 change in appellant's work restrictions. When she did not respond to the Office's October 14, 2004 request, it found that appellant failed to establish that he was disabled from performing his letter carrier duties on or after July 7, 2003. The Office incorrectly shifted the burden to appellant to prove that he was disabled on or after July 7, 2003. The burden of proof remained with the Office to demonstrate either that the disability had ceased or that it was no longer related to the

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(c) (March 1997). See also *Winton A. Miller*, 52 ECAB 405 (2001) and *Donald Leroy Ballard*, 43 ECAB 876 (1992).

¹⁰ Upon his return to duty, appellant was placed on an emergency suspension until the termination of his employment. This matter was contested and on April 2, 2004 the federal arbitrator upheld appellant's suspension and removal from service.

employment.¹¹ Dr. Shannon's July 16, 2003 report indicated that appellant was disabled from his date-of-injury job due to his accepted employment injury. While she did not respond to the Office's request for clarification regarding the change in his work status from May 23, 2003, this latter report cannot be ignored. Dr. Shannon's June 11 and July 16, 2003 reports include pertinent information relative to the May 23, 2003 work release form upon which the Office relied. Because the medical evidence is inconclusive with respect to appellant's ability to perform his letter carrier duties on or after July 7, 2003 the Board finds that the Office failed to meet its burden to terminate wage-loss compensation. Accordingly, appellant is entitled to wage-loss compensation retroactive to July 7, 2003.

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation effective July 7, 2003.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 2, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹¹ 20 C.F.R. § 10.503(a), (b) (1999).