

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

L.B., Appellant)
)
and)
)
U.S. POSTAL SERVICE, POST OFFICE,)
Muncie, IN, Employer)

)

**Docket No. 06-1030
Issued: September 26, 2006**

Appearances:
L.B., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated September 15, 2005 finding that he had not established total disability due to his federal employment. Appellant also filed a timely appeal of a March 13, 2006 decision declining to reopen his claim for review of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues in this case.

ISSUES

The issues are: (1) Whether appellant has met his burden of proof in establishing that he was totally disabled intermittently from June 15, 2004 to March 13, 2005 as alleged; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 25, 2005 appellant, then a 52-year-old clerk, filed a traumatic injury claim alleging that on June 12, 2004 he experienced severe pain in his shoulders and arms while pulling mail tubs.

Appellant submitted medical evidence in support of his claim from Dr. Stephen W. Shick, a Board-certified orthopedic surgeon, who examined appellant on June 18, 2004 and provided a history of lifting and pulling mail tubs at work. He diagnosed right shoulder adhesive capsulitis, status post subacromial decompression and rotator cuff repair. Dr. Shick stated that appellant should adhere to his permanent work restrictions including no lifting over 20 pounds and no overhead activity.

On July 21, 2004 Dr. Shick noted that appellant complained that his shoulder pain prevented him from working. He refused to provide appellant with a work excuse. Dr. Shick diagnosed adhesive capsulitis of the right shoulder and continued appellant's permanent work restrictions.

Dr. Michael Roper, an orthopedic surgeon, evaluated appellant on November 16, 2004 and supplied a history of shoulder injury on December 27, 2002. He noted that appellant experienced an additional injury in April 2004 pulling equipment. Dr. Roper diagnosed status post rotator cuff repair on the right, arthritis with acute synovitis, subacromial bursitis and adhesive capsulitis. He released appellant to return to work on November 17, 2004 with no lifting over 20 pounds and no overhead work.

The Office requested additional information regarding appellant's claim on February 9, 2005. Appellant stated that he had stopped work on November 19, 2004 and submitted a series of reports from Dr. E.D. Carrel, a Board-certified orthopedic surgeon, who completed a report on December 6, 2004 supporting appellant's claim for disability retirement. He reported both of appellant's shoulder injuries and opined that appellant's position at the employing establishment required repetitive motion, which aggravated his shoulder. Dr. Carrel noted that although appellant was on a 20-pound lifting restriction and sorted mail largely with his left arm, he experienced a continuing aggravation of the right shoulder with motion and work. He diagnosed chronic tendinitis of the right shoulder. On January 28, 2005 Dr. Carrel noted that appellant was not working and was experiencing chronic tendinitis in his right shoulder as well as his left. He reported that appellant did not plan to return to work.

The Office accepted appellant's claim for right shoulder capsulitis on March 17, 2005. The Office directed appellant to file a notice of recurrence of disability regarding his work stoppage on November 19, 2004. In a separate decision dated March 17, 2005, the Office denied appellant's claim for continuation of pay, finding that he had not reported his injury on a form approved by the Office within 30 days following the injury.¹

¹ As this decision was issued more than one year prior to the filing of appellant's appeal to the Board, on April 6, 2006, the Board may not review this decision on appeal. 20 C.F.R. § 501(3)(d)(2).

Dr. Carrel first examined appellant on August 11, 2004 and related his history of injury. He noted at that time that appellant was considering disability retirement due to the difficulty he experienced sitting eight hours a day. Dr. Carrel diagnosed chronic inflammation of the right shoulder.

In a note dated September 8, 2004, Dr. Carrel stated that appellant was still experiencing pain typical of impingement in his right shoulder. On September 15, 2004 Dr. Carrel provided the additional work restriction of no prolonged standing more than 30 minutes at a time without a break. He noted that appellant was unable to work September 8 and 15, 2004 due to shoulder pain.

Dr. Carrel examined appellant on November 24, 2004 and noted that appellant reported that his shoulder bothered him, that his work aggravated it and that he was unable to perform his duties without aggravating his shoulder. Appellant stated that he wished to pursue disability retirement.

On March 11, 2005 Dr. Carrel released appellant to return to work on March 13, 2005 within his permanent restrictions as well as no prolonged standing. Dr. Carrel further stated that appellant needed time off work from June 15, 2004 to March 13, 2005, for his right shoulder tendinitis which was aggravated by job activities.

Dr. Carrel examined appellant on April 8, 2005, suggested that he was experiencing cervical disc syndrome as a result of his work activities and recommended testing. However, he did not provide a firm diagnosis of this condition.

Appellant drafted a report dated April 20, 2005, stating that he was unable to work and under Dr. Carrel's care due to right shoulder chronic tendinitis on June 15, 16, 17, 29 and 30, July 2, 6, 7, 8, 10, 13, 14 and 21, August 19, September 3, 8, 13 and 30, October 1, 7, 8 and 13 and November 15, 19 and 29, 2004. Appellant also stated that he was totally disabled for the entire months of December 2004, January and February 2005 as well as March 2, 3, 4, 6, 7, 9, 10, 11, 13 and 14, 2005 intermittently. Dr. Carrel signed this report and noted that appellant's first visit to his office was August 11, 2004.²

On April 20, 2005 appellant completed a claim for compensation and requested wage-loss compensation from June 15, 2004 through March 13, 2005. The Office responded on June 22, 2005 and informed appellant that he had not submitted sufficient medical evidence to support his claim for total disability on the dates claimed. The Office requested a detailed narrative report explaining the change in the nature and extent of appellant's injury-related condition and how it rendered him totally disabled on the dates alleged.

² Appellant also submitted notes from a physical therapist in support of his claim. The Federal Employees' Compensation Act defines the term physician to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. §§ 8101-8193, 8102(2). A physical therapist is not a physician for the purposes of the Act and cannot, therefore, submit medical evidence. *Arnold A. Alley*, 44 ECAB 912 (1993).

Dr. Carrel completed a note on April 8, 2005, stating that appellant was under a physician's care and unable to work due to his right shoulder chronic tendinitis from June 15, 2004 through March 13, 2005.

Appellant completed a notice of recurrence of disability on May 26, 2005 and alleged that on June 12, 2004 he experienced a recurrence of his December 26, 2002 employment injury.³ He noted that following the December 26, 2002 injury he worked with restrictions.

On July 18, 2005 Dr. Carrel stated that it was necessary for appellant to be off work in November 2004 due to severe pain in the right shoulder and diagnosed chronic tendinitis.

By decision dated September 15, 2005, the Office denied appellant's claim for recurrence of total disability finding that he had not submitted sufficient evidence to establish that he was unable to perform the restricted-duty work assigned due to a change in the nature and extent of his injury-related condition.

Appellant requested reconsideration of the Office's September 15, 2005 decision on January 26, 2006. In support of his claim, appellant resubmitted the records from Dr. Carrel dated August 11, 2004 through April 8, 2005. He also included additional treatment notes dated May 6, July 8, September 14 and October 21, 2005. The new notes discussed appellant's degenerative disc disease symptoms in his left arm. The notes also addressed disability on June 30 and July 1, 2005 due to his right shoulder chronic rotator cuff tendinitis. Appellant also submitted approval of his disability retirement by the Office of Personnel Management.

By decision dated March 13, 2006, the Office declined to reopen appellant's claim for consideration of the merits finding that he had failed to submit relevant new evidence in support of his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is defined as the 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. 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 or illness is withdrawn 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 he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to

³ As the Office has not issued a final decision addressing this claim, the Board may not address it for the first time on appeal. 20 C.F.R. § 501.2(c).

⁴ 20 C.F.R. § 10.5(x).

establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. 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 limited-duty job requirements.⁵

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.⁶

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷

ANALYSIS -- ISSUE 1

In this case, appellant had a prior shoulder injury in December 2002, which required work restrictions. He sustained an additional new shoulder injury on June 12, 2004 and returned to work on June 18, 2004 continuing to work with restrictions on lifting and movements above his head. Appellant worked intermittently through November 19, 2004 at which point he stopped work entirely through March 13, 2005. As appellant was performing light-duty work at the time of his recurrence of total disability on or after November 19, 2004, he must establish either a change in the nature and extent of his light-duty job requirements or a change in the nature and extent of his injury-related condition. Appellant has not alleged that there was a change in his light-duty job requirements, therefore, the Board will focus the analysis on the issue of whether appellant has established a change in the nature and extent of his injury-related condition.

Appellant's attending physician, Dr. Shick, a Board-certified orthopedic surgeon, examined appellant on June 18, 2004 and provided a history of lifting and pulling mail tubs at work. He diagnosed right shoulder adhesive capsulitis, status post subacromial decompression and rotator cuff repair. Dr. Shick stated that appellant should adhere to his permanent work restrictions including no lifting over 20 pounds and no overhead activity. This report does not suggest a change in the nature and extent of appellant's condition such that he was totally disabled and could no longer perform the duties of his limited-duty position. Instead, Dr. Shick indicated that appellant could return to the light-duty position he was performing prior to his

⁵ *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁶ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁷ *Id.*

accepted employment injury on June 12, 2004. Dr. Shick also failed to support any specific period of total disability as a result of appellant's additional employment injury.

Dr. Shick examined appellant on July 21, 2004 and noted that appellant complained that his shoulder pain prevented him from working. He refused to provide appellant with a work excuse, suggesting that Dr. Shick did not support appellant's claim for total disability at that time. Dr. Shick again diagnosed adhesive capsulitis of the right shoulder and again continued appellant's permanent work restrictions. This report also fails to support appellant's claim for a change in the nature and extent of his injury-related condition such that he was totally disabled and could no longer perform the duties of his light-duty position. In addition Dr. Shick also failed to provide an opinion that appellant sustained any specific period of disability as a result of his injury.

Dr. Roper, an orthopedic surgeon, evaluated appellant on November 16, 2004 and supplied a history of shoulder injury on December 27, 2002. He noted that appellant experienced an additional injury in April 2004 pulling equipment. Dr. Roper diagnosed status post rotator cuff repair on the right, arthritis with acute synovitis, subacromial bursitis and adhesive capsulitis. He released appellant to return to work on November 17, 2004 with no lifting over 20 pounds and no overhead work. The Board notes that Dr. Roper's report does not support any period of total disability as he released appellant to return to his limited-duty position the day following his evaluation.

Appellant submitted treatment notes from Dr. Carrel, a Board-certified orthopedic surgeon, in support of his claim for a recurrence of total disability as well as to establish specific dates of total disability. Dr. Carrel first examined appellant on August 11, 2004 and diagnosed chronic inflammation of the shoulder. He did not differentiate this diagnosis from appellant's accepted condition of adhesive capsulitis of the right shoulder. Without medical reasoning, there is no probative medical evidence that appellant has sustained a change in the nature and extent of his injury-related condition.

Dr. Carrel also examined appellant on April 8, 2005, suggested he was experiencing cervical disc syndrome as a result of his work activities and recommended testing. However, Dr. Carrel did not provide a firm diagnosis of this condition. Without a clear diagnosis, there is no probative medical evidence to establish a change in the nature and extent of appellant's injury-related condition to include a cervical disc syndrome.

On September 15, 2004 Dr. Carrel increased appellant's work restrictions to include a limitation on prolonged standing. However, Dr. Carrel did not offer any explanation of how this work limitation related to appellant's accepted right shoulder conditions and due to this defect, this note is not sufficient to establish a change in the nature and extent of appellant's injury-related conditions.

The Board notes that Dr. Carrel has opined that appellant was totally disabled due to his shoulder condition in June and July 2004 in reports dated April 8 and 20, 2005. Dr. Carrel did not examine appellant until August 11, 2004. Therefore, his findings regarding appellant's total disability cannot outweigh the opinion of appellant's attending physician, Dr. Shick, who

examined appellant during June and July 2004 and found that he was capable of performing his limited-duty position.

Dr. Carrel also provided limited statements that appellant was totally disabled on August 19, 2004; September 3, 8, 13 and 30, 2004; October 1, 7, 8 and 13, 2004 and November 15, 19 and 29, 2004. He also stated that he was totally disabled for the entire months of December 2004, January 2005 and February 2005 as well as March 2, 3, 4, 6, 7, 9, 10, 11, 13 and 14, 2005 intermittently. On July 18, 2005 Dr. Carrel stated that it was necessary for appellant to be off work in November 2004 due to severe pain in the right shoulder. As noted above, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has specifically stated that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, such as the July 18, 2005 report from Dr. Carrel, without objective signs of disability being shown, this is not a sufficient medical opinion on the issue of disability or a basis for payment of compensation.⁸ Dr. Carrel did not provide any findings on examination in support of his conclusion that appellant was totally disabled on the dates in question. Therefore, his reports are not sufficient to support appellant's claim for total disability on those dates.

The Board finds that appellant has not submitted the necessary detailed medical opinion evidence complete with objective physical findings to support a change in the nature and extent of his injury-related condition or to support the periods of disability claimed.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant attempted to submit relevant new evidence not previously considered by the Office. He resubmitted treatment notes from Dr. Carrel dating from August 11, 2004 through April 8, 2005. As the Office had considered these notes in reaching the September 15, 2005 decision, the notes are not relevant new evidence

⁸ *Id.*

⁹ 5 U.S.C. §§ 8101-8193, § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ 20 C.F.R. § 10.608(b).

and are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant also submitted additional new medical evidence from Dr. Carrel dated May 6, July 8, September 14 and October 21, 2005. In order to require the Office to reopen appellant's claim for consideration of the merits, these notes must be relevant to the underlying issues in appellant's claim that he has sustained a change in the nature and extent of his injury-related condition and sustained any specific periods of disability claimed as a result of this recurrence of disability. Dr. Carrel's notes did not address any period of disability previously claimed by appellant or a change in his employment-related condition, but instead discussed appellant's left arm symptoms due to degenerative disc disease. Although Dr. Carrel did find appellant disabled on June 30 and July 1, 2005 due to his right shoulder chronic rotator cuff tendinitis, these dates were not in dispute at the time of the Office's September 15, 2005 decision and, therefore, cannot constitute relevant new evidence regarding appellant's claim for disability through March 13, 2005.

Appellant also submitted approval of his disability retirement by the Office of Personnel Management. The Board has previously held that findings of other administrative agencies are not determinative with regard to proceedings under the Act as administered by the Office and Board.¹² The finding by the Office of Personnel Management that appellant was unable to work is not relevant to appellant's claim for a period of total disability as a result of a change in the nature and extent of his accepted employment-related condition as the standards for this finding are not those required by the Act. This finding cannot address the central issue of appellant's claim, whether the medical evidence establishes a period of total disability as defined by the Board. As appellant has failed to submit any relevant new evidence in support of his claim, the Office properly refused to reopen his claim for further consideration of the merits.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical evidence to establish a period of total disability as a result of his accepted employment-related condition. The Board further finds that appellant did not submit the necessary relevant new evidence to require the Office to reopen his claim for consideration of the merits.

¹² *George A. Johnson*, 43 ECAB 712 (1992).

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2006 and September 15, 2005 decision of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: September 26, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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