

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

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**J.B., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION PLANT, Charlotte, NC,  
Employer**

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**Docket No. 07-481  
Issued: September 4, 2007**

*Appearances:*  
*Humphrey S. Cummings, Esq., 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 12, 2006 appellant timely appealed the September 7, 2006 merit decision of the Office of Workers' Compensation Programs which denied his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUE**

The issue is whether appellant is entitled to wage-loss compensation for total disability during the period May 14, 2004 to April 8, 2005.

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<sup>1</sup> The record on appeal contains evidence that was received after the Office issued its September 7, 2006 decision. The Board's review is limited to the evidence of record at the time the Office rendered its final decision. 20 C.F.R. § 501.2 (2007).

## **FACTUAL HISTORY**

Appellant, a 53-year-old modified mail handler, has an accepted claim for aggravation of right rotator cuff tear and aggravation of right shoulder impingement syndrome, which arose on or about May 14, 2004.<sup>2</sup> He stopped working on May 17, 2004.<sup>3</sup>

Dr. David R. Kingery, a Board-certified orthopedic surgeon, treated appellant for a right shoulder injury dating back to June 2003. When he saw appellant on May 7, 2004, Dr. Kingery noted that he was status post right rotator cuff repair. Dr. Kingery advised that appellant could perform modified duty with a restriction of no repetitive motion on his right side.

On May 17, 2004 appellant went to the Union Regional Medical Center emergency room where he was treated by Dr. Jonathan C. Neuman,<sup>4</sup> who diagnosed right rotator cuff injury and prescribed pain medication. Dr. Neuman also excused appellant from work for two days and advised him to follow-up with Dr. Kingery.

A May 19, 2004 work certificate from First Care Medical Clinic indicated that appellant could return to work May 21, 2004.<sup>5</sup> Another similar certificate, dated May 26, 2004, advised that appellant could return to work on June 2, 2004.

On June 7, 2004 Dr. Kingery indicated that appellant was able to work with certain restrictions. He imposed a 10-pound limit on lifting, pushing and pulling. Dr. Kingery also advised against engaging in overhead work and repetitive motion on the right side.

In an August 4, 2004 letter, Dr. Kingery indicated that he had been treating appellant for a right shoulder injury since June 2003. He explained that appellant had a potential preexisting condition of impingement and possible rotator cuff tear which was aggravated by his work involving sorting and lifting. Dr. Kingery also indicated that appellant had undergone surgery for his right shoulder condition.

On March 7, 2005 Dr. Kingery advised that appellant should not return to work until he is reevaluated. He noted that appellant required a functional capacity evaluation and physical therapy for the right shoulder.

A March 30, 2005 functional capacity evaluation revealed that appellant was capable of performing at the "light" physical demand level.

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<sup>2</sup> The employing establishment had been providing appellant modified-duty work as a result of employment injuries he sustained on July 16, 2001 (06-2040450) and November 18, 2003 (06-2101209). The earliest claim was for injuries primarily involving the lower extremities and the latter claim was accepted for cervical strain which reportedly had resolved April 6, 2004.

<sup>3</sup> Appellant filed his claim on August 13, 2004 but the employing establishment did not forward it to the Office until December 16, 2004. The Office accepted the claim on February 4, 2005.

<sup>4</sup> Dr. Neuman is Board-certified in emergency medicine.

<sup>5</sup> The physician's signature is illegible.

On April 11, 2005 appellant filed a claim for compensation (Form CA-7), for the period of May 14, 2004 to April 8, 2005. On April 19, 2005 the Office advised appellant of the need to submit medical evidence establishing disability for work during the entire period claimed. The Office explained that the current record did not support an injury-related disability and that he should submit the necessary documentation within 30 days.

The Office later received another return to work certificate which indicated that appellant was able to return to work on June 24, 2004.<sup>6</sup>

In a decision dated June 8, 2005, the Office denied appellant's claim for compensation for the period May 14, 2004 to April 8, 2005.

Following the decision, the Office received additional medical records that included a June 1, 2004 work status report from Dr. Kingery indicating that there were no changes in appellant's work restrictions.<sup>7</sup> Appellant also submitted Dr. Kingery's April 28, 2005 treatment notes. Dr. Kingery indicated that appellant had reached maximum medical improvement (MMI). He found that she had 10 percent permanent impairment of the right upper extremity. Dr. Kingery released appellant from his care and advised him to follow the restrictions imposed under the March 30, 2005 functional capacity evaluation.

In a March 7, 2006 report, Dr. Kingery stated that all of appellant's absences from work prior to his rating and release on April 28, 2005 should be medically excused, based on his inability to perform his work functions.

Appellant requested reconsideration on May 31, 2006. The Office reviewed the claim on the merits and denied modification by decision dated September 7, 2006.

### **LEGAL PRECEDENT**

Disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>8</sup> Disability may be partial or total.<sup>9</sup> The employee bears the burden of establishing that he was disabled for work as a result of his accepted employment injury.<sup>10</sup> Whether an accepted injury caused an employee to be disabled

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<sup>6</sup> Appellant also submitted additional copies of documents that were previously of record.

<sup>7</sup> Based on the evidence submitted, Dr. Kingery last saw appellant on May 7, 2004 at which time he imposed a work restriction of no repetitive motion on the right side.

<sup>8</sup> 20 C.F.R. § 10.5(f) (2007).

<sup>9</sup> *Id.*

<sup>10</sup> *William A. Archer*, 55 ECAB 674, 679 (2004).

for work is a medical issue.<sup>11</sup> The Office is not obligated to pay wage-loss compensation absent pertinent medical evidence addressing the specific dates for which disability is claimed.<sup>12</sup>

### ANALYSIS

Although appellant requested compensation beginning May 14, 2004 the record indicates that he did not stop working until May 17, 2004. On May 17, 2004 Dr. Neuman excused appellant from work for two days because of a right rotator cuff injury. However, the emergency room treatment records do not specifically relate appellant's right shoulder condition to his employment as a modified mail handler. Accordingly, this evidence is insufficient to establish an employment-related disability.

The May 19 and 26 and June 24, 2004 return to work certificates from First Care Medical Clinic also fail to establish an employment-related disability. The certificates do not identify a specific medical condition for which appellant was presumably being treated and rather than establishing total disability during the claimed period, these certificates indicate that appellant was capable of resuming work on May 21 and June 2 and 24, 2004.

The only other relevant evidence regarding disability was provided by Dr. Kingery. Prior to appellant's May 17, 2004 work stoppage, Dr. Kingery imposed a restriction of no repetitive motion on the right side. This May 7, 2004 work restriction remained in effect when he examined appellant on June 1, 2004. On June 7, 2004 Dr. Kingery imposed additional restrictions of no overhead work and no lifting, pushing and pulling in excess of 10 pounds. The June 7, 2004 weight restriction was, in fact, less of a restriction than the five-pound limitation associated with the modified mail handler duties appellant performed prior to his May 17, 2004 work stoppage.<sup>13</sup> Nine months later, Dr. Kingery submitted a March 7, 2005 work status report advising that appellant should not return to work until he is reevaluated. He noted that appellant required physical therapy and a functional capacity evaluation. Shortly thereafter, appellant underwent a functional capacity evaluation and on April 28, 2005, Dr. Kingery reviewed the report and indicated that appellant had reached MMI. He released appellant in accordance with the restrictions of the March 30, 2005 functional capacity evaluation which indicated an ability to function at the "light" physical demand level. Dr. Kingery later excused appellant from all absences from work prior to April 28, 2005, "based on his inability to perform his work functions."

Dr. Kingery's various reports do not explain why appellant was presumably unable to perform his modified mail handler duties. His June 1 and 7, 2004 reports indicate that appellant was capable of performing modified-duty work. As noted, appellant was performing modified-duty work when he stopped work on May 17, 2004. Dr. Kingery played a role in crafting appellant's April 28, 2004 modified-duty assignment which incorporated certain restrictions

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<sup>11</sup> *Tammy L. Medley*, 55 ECAB 182, 184 (2003).

<sup>12</sup> *William A. Archer*, *supra* note 10.

<sup>13</sup> Appellant's latest modified-duty assignment was prepared on April 28, 2004 in accordance with restrictions imposed by Dr. Kingery on April 20, 2004.

associated with his right shoulder condition. To the extent that appellant was no longer capable of performing the April 28, 2004 modified mail handler position; it was incumbent upon Dr. Kingery to explain what aspects of the position he was no longer able to perform.

There is also a gap in appellant's treatment records from June 2004 to March 2005. It appears that he did not seek any medical attention for his right shoulder condition during this nine-month time frame and when he returned to Dr. Kingery on March 7, 2005, Dr. Kingery offered no explanation or objective evidence to support his finding that appellant was unable to work at that time. Thus, there is no contemporaneous medical evidence establishing a disability for work from June 7, 2004 to March 7, 2005. While Dr. Kingery indicated that appellant should not work after March 7, 2005, he failed to provide a basis for his findings.

On March 7, 2006 Dr. Kingery provided a blanket medical excuse for all work absences prior to April 28, 2005. However, he did not identify specific work functions that appellant was reportedly unable to perform. This latter report also tends to contradict Dr. Kingery's May and June 2004 reports, wherein he indicated that appellant was able to perform modified-duty work.

The record indicates a willingness on the part of the employing establishment to accommodate appellant's various physical limitations. In fact, the employing establishment accommodated appellant's right shoulder condition prior to the filing of the instant claim. Thus, there is no reasonable basis to conclude that the employing establishment was either unable or unwilling to continue to accommodate appellant. The Board finds that the medical evidence of record does not establish that appellant was disabled from May 14, 2004 to April 8, 2005 as a result of his employment-related right shoulder condition.

### **CONCLUSION**

Appellant failed to establish that he was disabled from May 14, 2004 to April 8, 2005 due to his May 14, 2004 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 7, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2007  
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