

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

M.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Point Pleasant Beach, NJ, Employer**

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**Docket No. 08-532
Issued: December 24, 2008**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2007 appellant filed a timely appeal from a July 25, 2007 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation on February 24, 2003 on the grounds that he had no residuals from his accepted right shoulder condition; and (2) whether appellant established that he had any continuing employment-related disability after that date due to his right shoulder condition.

FACTUAL HISTORY

On July 15, 1999 appellant, then a 57-year-old letter carrier, filed a Form CA-1, traumatic injury claim, alleging that he sustained multiple injuries when he fell from his postal vehicle while delivering mail. He stopped work that day and did not return. The Office accepted that appellant sustained a contusion of the right wrist, abrasions to both hands and a right rotator cuff

tear.¹ On September 1, 1999 Dr. Il H. Kim, Board-certified in orthopedic surgery, performed arthroscopic surgery on appellant's right knee.² Appellant was placed on the periodic rolls and on November 9, 1999 Dr. Richard Borgatti, a Board-certified orthopedic surgeon, surgically repaired the right shoulder. In a February 7, 2000 report, Dr. Borgatti advised that appellant could return to light duty with no overhead work and a five-pound weight restriction. On March 20, 2000 he advised that appellant could return to regular duty except for heavy abduction lifting. On July 6, 2000 appellant fractured a thoracic vertebral when he fell more than one story at home while cleaning gutters.

By report dated September 11, 2000, Dr. Borgatti noted that appellant had back surgery with posterior stabilization for a T12 fracture. In a work restriction evaluation dated September 11, 2000, he advised that appellant could work eight hours a day with restrictions on climbing of one hour, kneeling and twisting for four hours, could intermittently lift and bend with a 20- to 50-pound weight restriction. On January 8, 2001 appellant declined a job offer, advising that he could not accept due to his knee and back conditions. Duty status reports dated January 24 and 27, 2001 from Drs. Borgatti and Kim respectively, advised that appellant could return to work with restrictions to his physical activity. Dr. Borgatti's restrictions were in agreement with the work requirements provided by the employing establishment. Dr. Kim provided restrictions that appellant could stand and walk for six hours daily, climb and kneel for one hour, twist and pull/push for four hours with a 14-pound weight restriction.³

In January 2001, Office referred appellant to Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated February 26, 2001, Dr. Strouse noted his review of the medical record, the history of injury, a past medical history of bilateral work-related knee injuries and appellant's complaint of right shoulder pain. He advised that physical examination demonstrated residual limited motion of the right shoulder and diagnosed rotator cuff tear, right shoulder. Dr. Strouse stated that the injuries related to appellant's September 16, 1998 injury of a torn right meniscus and internal derangement and left ankle fracture were not causing significant disabling residuals but that appellant had residual disability secondary to the nonwork-related back injury. He advised that in six months appellant should have full use of his right shoulder without restriction but had not yet reached maximum medical improvement so that, while he could return to work as a letter carrier, he had temporary restrictions for six months regarding his right shoulder and restrictions due to his nonwork-related back injury. In a work capacity evaluation dated February 28, 2001, Dr. Strouse advised

¹ See discussion *infra* regarding appellant's right knee condition.

² The Board notes that appellant has a companion case before the Board, Docket No. 08-1926, that will be adjudicated separately. That claim was initially adjudicated under OWCP File Nos. xxxxxx790, date of injury November 14, 1978, and xxxxxx368, date of injury September 16, 1998. On February 7, 2008 the Office combined those files with that of the current claim, with xxxxxx790 becoming the master file.

³ The record includes another duty status report dated January 12, 2001 with an illegible signature. This report provided a diagnosis of burst fracture at T12 and advised that appellant could return to work on February 6, 2001 with restrictions to his physical activity. A duty status report with the same signature dated August 19, 2001 provided restrictions that appellant could continuously sit, stand, walk, bend, stoop and twist for three hours daily and intermittently for eight hours, could continuously climb and kneel for one hour, intermittently climb for eight hours and kneel for four hours. Pushing and pulling was limited to 40 pounds.

that appellant could work eight hours a day with restrictions that he could reach and reach above the shoulder for one hour daily, could push, pull and lift 30 to 40 pounds for three hours daily, could walk and stand for four hours daily and could sit for eight hours daily.

On July 16, 2001 appellant accepted a limited-duty job offer. By letter dated August 10, 2001, the postmaster informed appellant that he could not return to work until medically cleared. Appellant did not return to work and on September 6, 2001 filed a Form CA-2a, recurrence claim, alleging that he sustained a recurrence of disability on August 6, 2001. In an October 10, 2001 report, Dr. Borgatti's impression was status post rotator cuff repair with a reasonably good result. He noted some minor discomfort with repeated overhead work and provided restrictions to appellant's physical activity. By decision dated November 9, 2001, the Office denied appellant's claim that he sustained a recurrence of disability on August 6, 2001. On November 16, 2001 appellant, through his attorney, requested a hearing. By decision dated March 27, 2002, an Office hearing representative set aside the November 9, 2001 decision. The hearing representative found that appellant was entitled to wage-loss compensation beginning August 6, 2001 and remanded the case to the Office for further develop of the medical evidence to determine if appellant had continuing residual disability due to his employment-related right shoulder condition.

On April 12, 2002 the Office again referred appellant to Dr. Strouse for a second opinion evaluation. Dr. Strouse was asked to specifically evaluate appellant's right shoulder. By report dated May 6, 2002, regarding appellant's right shoulder, he reported that appellant still complained of pain when performing "extreme" activities such as reaching but was otherwise much improved. Physical examination demonstrated slight tenderness over the rotator cuff. Range of motion was full and painless, and there was no atrophy, muscle weakness, sensory loss, reflex abnormality or vascular abnormality in the upper extremities. Dr. Strouse diagnosed status post arthroscopic rotator cuff repair of the right shoulder and status post open reduction with internal fixation burst fracture at T12. He opined that appellant had no further disability related to his right shoulder and had made a complete recovery. In a work capacity evaluation dated June 12, 2002, Dr. Strouse advised that appellant had no restrictions due to his work-related right shoulder injury, and provided restrictions that appellant could walk and stand for six hours daily, push, pull, lift, squat, kneel and climb for four hours daily, with a weight restriction of 30 to 40 pounds. He advised that all restrictions were due to the nonwork-related T12 fracture.

By decision dated June 12, 2002, the Office determined that appellant was capable of returning to full-time work with no medical restrictions. On June 25, 2002 appellant's attorney requested a hearing. In a November 6, 2002 decision, an Office hearing representative found the case not in posture for a hearing because, as appellant was not provided a pretermination notice, he was not afforded proper due process. The case was remanded to the Office for reinstatement of compensation and to provide appellant proper notice. On January 7, 2003 the Office informed appellant that it proposed to terminate his wage-loss compensation on the grounds that Dr. Strouse found that he had no residuals of his accepted right shoulder condition. By letter dated January 21, 2003, appellant's attorney disagreed with the proposed termination. In a February 24, 2003 decision, the Office terminated appellant's wage-loss compensation. On February 27, 2003 appellant, through his attorney, requested a hearing and, by letter dated

March 3, 2003, the Office informed appellant, who had retired on civil service benefits through the Office of Personnel Management, that he was entitled to wage-loss compensation for the period August 5, 2001 through February 24, 2003 and therefore needed to elect compensation benefits. On March 21, 2003 appellant elected to receive compensation benefits under the Federal Employees' Compensation Act,⁴ and he received wage-loss compensation through February 24, 2003.

At the hearing, held on October 27, 2003, appellant testified regarding work-related knee injuries, and that he had returned to work in September 1998 following surgery. He described the July 15, 1999 employment injury and stated that he used a cane due to his knee injuries. Appellant's attorney argued that a conflict in medical evidence existed between the opinions of Drs. Borgatti and Strouse regarding whether appellant had residuals of his accepted right shoulder injury. By decision dated January 2, 2004, an Office hearing representative affirmed the February 24, 2003 decision. Appellant then filed an appeal with the Board and on October 8, 2004 requested that the appeal be withdrawn. By order dated November 15, 2004, the Board dismissed the appeal at appellant's request.⁵ On November 22, 2004 appellant, through his attorney, requested reconsideration and submitted a September 28, 2004 report in which Dr. Borgatti reported that he began treating appellant on July 19, 1999 and described appellant's course of treatment, noting that on October 10, 2001 appellant's main complaint was that he would have pain when sleeping on his shoulder but that during the day it was "reasonably good" with discomfort on active forward elevation beyond 150 degrees. Dr. Borgatti's diagnosis at that time was status post rotator cuff repair with a reasonably good result and he advised that appellant should avoid repeated overhead work and could carry mail for four hours a day and do sedentary work for the other four hours. He noted that appellant returned on August 23, 2004, five years status post rotator cuff repair, with complaints of increasing pain, particularly with straight abduction and overhead lifting. On examination, rotator cuff weakness was thought to be secondary to pain. Dr. Borgatti reported magnetic resonance imaging (MRI) scan findings of a healed right rotator cuff with no evidence of tears. Mild tenderness and crepitation were noted. Dr. Borgatti diagnosed residual pain, status post rotator cuff repair and advised that no further treatment for the rotator cuff or right shoulder was required but he should avoid repeated overhead activities and lifting objects at arm's reach that caused his symptoms.

In a merit decision dated July 25, 2007, the Office denied modification of the prior decision, finding that the weight of the medical evidence rested with the opinion of Dr. Strouse.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof in terminating compensation includes the necessity

⁴ 5 U.S.C. §§ 8101-8193.

⁵ Docket No. 05-29 (issued November 15, 2004).

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits due to his right shoulder condition on February 24, 2003. The medical evidence contemporaneous with the Office's termination includes Dr. Strouse's May 6 and June 12, 2002 reports in which he advised that appellant had made a complete recovery from his right shoulder injury and had no disability or restrictions due to this injury. Any restrictions provided were due to a nonwork-related fall at home where appellant fractured a T12 vertebra. While appellant disagreed with the proposed termination, he submitted no additional medical evidence. His attending orthopedist had not provided a report since October 10, 2001.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report,⁸ and contemporaneous evidence is entitled to greater probative value than later evidence.⁹ The Board finds that the weight of the medical evidence rests with the reports of Dr. Strouse who opined that appellant had made a full recovery from his July 15, 1999 right shoulder injury. Thus, the Office properly found that appellant had no residuals and terminated his compensation benefits on February 24, 2003.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's wage-loss compensation on February 24, 2003, the burden shifted to him to establish that he had any continuing disability causally related to his accepted right shoulder injury.¹⁰ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.¹¹ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the

⁷ *Id.*

⁸ *Michael S. Mina*, 57 ECAB 379 (2006).

⁹ *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

¹⁰ *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹¹ *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹² *Id.*

claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

Under the Act,¹⁴ the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.¹⁵ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that appellant submitted insufficient medical evidence with his November 22, 2004 reconsideration request to establish that he continued to be disabled from the accepted right shoulder condition after February 23, 2004. With his reconsideration request, appellant submitted a September 28, 2004 report from Dr. Borgatti, an attending orthopedist, who noted that, while he began treating appellant for his right shoulder injury in July 1999, he had not seen appellant since October 10, 2001. Right shoulder examination in September 2004 demonstrated rotator cuff weakness secondary to pain, and the physician advised that appellant should avoid repeated overhead activities and lifting objects at arms reach. Dr. Borgatti did not, however, specifically provide an opinion regarding appellant's ability to work and merely diagnosed residual pain. Furthermore, he advised that appellant required no further treatment for his right rotator cuff and did not discuss the consequences of appellant's fall at home in July 2000 when he fractured a thoracic vertebral. The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁷ The Board therefore finds that, as appellant did not provide additional detail or a rationalized medical opinion sufficient to meet his burden of proof, he did not substantiate that any claimed disability on or after February 24, 2003 was causally related to the July 15, 1999 right shoulder injury.¹⁸

¹³ *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹⁶ *Tammy L. Medley*, 55 ECAB 182 (2003).

¹⁷ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁸ *See Mary A. Ceglia*, 55 ECAB 626 (2004).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on February 23, 2003 and that appellant failed to meet his burden of proof to establish that he had any disability after February 23, 2003 causally related to his accepted right shoulder condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 25, 2007 be affirmed.

Issued: December 24, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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