

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

S.H., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, LOGAN AIRPORT,
East Boston, MA, Employer**

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**Docket No. 08-1451
Issued: December 18, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 21, 2008 appellant filed a timely appeal of an April 24, 2007 merit decision of the Office of Workers' Compensation Programs denying his recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability commencing February 3, 2005 causally related to his accepted injury of July 14, 2003.

FACTUAL HISTORY

On July 14, 2003 appellant, then a 27-year-old transportation security screener, sustained injury to his right shoulder while lifting heavy bags. On March 31, 2004 the Office accepted appellant's claim for right rotator cuff tear. On January 26, 2004 Dr. William R. Creevy, a

Board-certified orthopedic surgeon, performed an arthroscopy with rotator cuff repair, right shoulder.

In a June 15, 2004 report, Dr. Creevy noted that appellant was experiencing discomfort in his shoulder that was aggravated by overhead lifting. He noted that appellant's job involved repetitive overhead lifting and gave him the "standard work note to be out of work." In a July 29, 2004 report, Dr. Creevy advised that appellant had continuing discomfort in his shoulder and should continue receiving therapy.

The Office referred appellant to Dr. Richard A. Alemian, a Board-certified orthopedic surgeon, for a second opinion. In a September 27, 2004 report, Dr. Alemian diagnosed as "status post repair, torn rotator cuff, right shoulder." He noted that appellant sustained a work-related injury to his right shoulder resulting in a torn rotator cuff requiring surgical repair. Appellant was still in a recovery phase and experienced a moderate amount of discomfort. Dr. Alemian advised that appellant should only lift five pounds very infrequently. Appellant required a sedentary-type position and Dr. Alemian recommended that he be started at four hours a day. Dr. Alemian also restricted reaching to one hour.

On October 8, 2004 the employing establishment offered appellant modified limited-duty work at the x-ray, exit lane, entry and walkway through the metal detector. Appellant was limited to working four hours a day with no lifting above his shoulder and intermittent lifting/pushing/pulling limited to five pounds. In a report dated November 16, 2004, Dr. Creevy reiterated that appellant could return to work in a modified-duty capacity starting out at four hours a day with no lifting greater than 5 or 10 pounds.

On November 12, 2004 Dr. Ian S. Rogers, a Board-certified internist, advised that appellant was hospitalized from November 7 through 12, 2004 for pneumonia. On December 2, 2004 Dr. Creevy found appellant temporarily totally disabled from November 28 through December 11, 2004 due to steroid infection and repair of rotator cuff.

In a note dated December 7, 2004, Dr. Eleanor Paglia, a Board-certified internist, advised appellant to remain out of work until a computerized tomography scan was completed. She advised that he was recovering from pneumonia and had "persisting symptoms that may indicate continued infection."

On January 12, 2005 Dr. Paglia released appellant to return to work. On February 1, 2005 appellant's treating physician, Dr. Creevy, indicated that appellant had right shoulder strain, but could return to light-duty work four hours a day. Appellant returned to modified light duty four hours a day on January 23, 2005.

In a work status note dated February 1, 2005, Dr. Creevy indicated that appellant had right shoulder strain but could work four hours a day at light duty. He further noted that appellant must be able to sit if needed.

Appellant subsequently filed claims for compensation commencing February 3, 2005.

In a February 11, 2005 note, a nurse practitioner at Boston Medical Center indicated that appellant had been advised to remain out of work for five days. Appellant could return to work with no heavy lifting, no long periods of standing and no working without his medications.

In a February 24, 2005 form, Dr. Creevy advised that appellant could not return to work. He noted that appellant had symptoms that “seem to be more radicular in nature.” Dr. Creevy ordered x-rays and a magnetic resonance imaging (MRI) scan and that he was to remain off work until the diagnostic tests were completed. He subsequently noted that the x-rays showed some mild disc space narrowing at C6-7 with posterior osteophytes and no subluxation. In a March 17, 2005 progress note, Dr. Creevy reviewed the MRI scan which showed multiple areas of disc space abnormality, most pronounced at the C4-5 level with posterior bulging/protrusion. He noted that appellant had right paracervical/periscapular pain with some radiation down the hand. Dr. Creevy also noted some discomfort about the lateral aspect of the shoulder.

In an April 1, 2005 note, Dr. Christopher Bono, a Board-certified orthopedic surgeon and associate of Dr. Creevy, indicated that appellant did not have any signs or symptoms of central canal stenosis, myelopathy or objective signs of spinal cord compression. He noted that appellant’s disc herniation was towards the left side and that all of his symptoms were on the right side. Dr. Bono recommended continuing with physical therapy.

In an attending physician’s report dated April 12, 2005, Dr. Creevy diagnosed a two disc protrusion at C4-5. He advised that appellant could not work. In an April 28, 2005 note, Dr. Creevy indicated that appellant should continue with physical therapy and remain off work.

By decision dated June 1, 2005, the Office denied appellant’s claim for a recurrence of disability. It found that appellant had not established that he was unable to perform the four-hour workday modified-duty assignment.

On July 18, 2005 appellant requested reconsideration. In a May 24, 2005 report, Dr. Creevy noted that he treated appellant for injuries sustained at work on November 26, 2002. Surgery was performed which included an arthroscopy and rotator cuff repair of the right shoulder. Dr. Creevy indicated that appellant remained fully disabled. In a June 16, 2005 letter, he noted that appellant initially injured his right shoulder in November 2002 while working at the airport lifting a heavy bag. He provided a chronological listing of appellant’s treatment. On July 14, 2005 Dr. Creevy indicated that appellant was considering surgery. He noted that appellant had ongoing discomfort in his neck and radicular symptoms that were worsened when he turned his head. Dr. Creevy concluded that appellant was not able to work in a position as a security guard.

By decision dated October 13, 2005, the Office denied modification of the June 1, 2005 decision.

On January 30, 2006 appellant requested reconsideration. In a December 15, 2005 note, Dr. Creevy advised that appellant had full elevation and internal rotation to the mid-lumbar level. He noted external rotation of 80 degrees and good strength. Dr. Creevy indicated that there was mild tenderness over the superior and medial border of the scapula. He did not recommend

further surgery but noted that appellant would be treated with therapy. With regard to appellant's work status, he stated:

“[Appellant's] prior issue is whether he is capable of returning to work due to his work-related injury. He was initially clear for return to work in February of 2004, light duty. However, [appellant] was unable to do this because of continued pain in the shoulder. He was reevaluated by [Dr. Creevy] in February of 2005, at which time, based upon his findings, it was my opinion that he was unable to return to work and that this was causally related to his injury at work and the subsequent surgery.”

By decision dated July 14, 2006, the Office denied modification of its prior decisions.

On January 12, 2007 appellant requested reconsideration. He submitted medical records from Dr. Paglia dated May 30 through December 28, 2006. Dr. Paglia noted that appellant was seen for right shoulder pain and neck pain. She also noted other medical problems, including pneumonia, hemorrhoids, depression and eye irritation. Dr. Paglia recommended physical therapy.

By decision dated April 24, 2007, the Office denied modification of its July 14, 2006 decision.

LEGAL PRECEDENT

The Office's regulation defines the term recurrence of disability as follows: “Recurrence of disability means an 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 (except when such withdrawal occurs for reasons of misconduct, on-performance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.”¹

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 of record establishes that he or she 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 show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.² To establish a change in the

¹ *J.F.*, 58 ECAB ____ (Docket No. 06-186, issued October 17, 2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

² *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x).

nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.³

ANALYSIS

The Office accepted that appellant sustained a right rotator cuff tear as a result of a July 14, 2003 injury. In a September 27, 2004 report, Dr. Alemian, advised that appellant could return to work four hours a day with lifting restricted to five pounds infrequently. On October 8, 2004 the employing establishment offered appellant modified duty four hours a day with no lifting above his shoulder and intermittent pushing/pulling and lifting limited to five pounds. In a November 16, 2004 note, Dr. Creevy, appellant's treating orthopedic surgeon, agreed that appellant could work at modified duty four hours a day with no lifting greater than 5 to 10 pounds. Appellant returned to work at modified duty on January 23, 2005. He continued in this assignment until February 3, 2005. Appellant seeks total disability compensation commencing that date.

The medical evidence does not establish that appellant sustained disability due to his accepted right shoulder conditions. The Board notes that the February 11, 2005 note from the nurse practitioner has no probative value as a nurse is not a "physician" as defined under the Act.⁴ On February 24, 2005 Dr. Creevy advised that appellant could not work noting radicular symptoms. He subsequently diagnosed a cervical condition at C6-7 with bulging and protrusion. Dr. Creevy attributed appellant's disability for work to a condition which has not been accepted as employment related. Although he noted some discomfort about the shoulder, Dr. Creevy did not address how the accepted shoulder condition caused or contributed to appellant's disability commencing February 3, 2005. Dr. Creevy did not provide any reasons as to why appellant's right rotator cuff condition had deteriorated to such a degree that he could no longer perform the modified-duty assignment. The notes from Dr. Paglia dated May 30 through December 28, 2006 address appellant's ongoing condition. However, she did not address whether appellant was unable to perform limited-duty work as of February 3, 2005 due to his accepted right shoulder condition.

The Board finds that appellant has not submitted sufficiently rationalized medical evidence establishing that he was totally disabled beginning February 3, 2005 due to his employment-related right rotator cuff tear. Furthermore, there is no evidence showing that appellant experienced a change in the nature and extent of the limited-duty requirements or was required to perform duties which exceeded his medical restrictions.

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-

³ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

⁴ *See Vicky L. Hannis*, 48 ECAB 538 (1997); *Joseph N. Fassi*, 42 ECAB 231 (1991); *Joseph Bennett*, 38 ECAB 484 (1987).

duty requirements which would prohibit him from performing the limited-duty position he assumed after he returned to work.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability on or about February 3, 2005 causally related to his accepted work injury of July 14, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 24, 2007 is affirmed.

Issued: December 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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