

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

E.M., Appellant)
and) Docket No. 08-1861
U.S. POSTAL SERVICE, POST OFFICE,) Issued: January 26, 2009
San Francisco, CA, Employer)

)

Appearances:
Appellant, 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 June 23, 2008 appellant filed a timely appeal from a March 14, 2008 decision of the Office of Workers' Compensation Programs, denying his claim for disability compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he was disabled during the periods October 19 through November 9 and December 3 through 28, 2007.

FACTUAL HISTORY

On September 10, 2007 appellant, then a 49-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a shoulder injury as a result of performing mail handler duties for 24 years, including repetitive and forceful pushing, pulling, grasping, overhead throwing and heavy, overhead lifting. He previously sustained bilateral carpal tunnel syndrome and trigger finger in the performance of duty.

In a decision dated September 21, 2007, the Office accepted appellant's claim for left shoulder labrum tear and left shoulder tendinitis.

In an August 23, 2007 work status report, Dr. A. Shabi Khan, a Board-certified orthopedic surgeon, restricted appellant's work duties to lifting no more than 30 pounds and standing no more than two hours a day. He modified these restrictions in a September 27, 2007 duty status report to lifting no more than 25 pounds and standing no more than one hour a day. On October 2, 2007 appellant accepted a light-duty position accommodating his standing and lifting limitations.

On October 25, 2007 Dr. Khan examined appellant. He concluded that appellant had multiple and changing findings with respect to his shoulders, but that he should remain in his work capacity at that time. In duty and work status reports, Dr. Khan continued appellant's lifting and standing restrictions, commenting that appellant could work an eight-hour day and overtime.

In a medical report dated November 16, 2007, Dr. Khan addressed appellant's continuing shoulder pain and requested authorization to perform a left shoulder arthroscopy.

On December 13, 2007 Dr. Khan saw appellant for a shoulder consultation, noting that a rotator cuff repair of appellant's left shoulder had been authorized and requesting a single hot and cold compression unit and a postoperative abduction sling. On December 29, 2007 appellant reported to Dr. Khan, presenting increased pain and an inability to perform many activities. Dr. Khan noted decreased range of motion in appellant's shoulder and mild tenderness in the anterior aspect of the acromion, with signs of a positive impingement. He took appellant off work due to significantly increased left shoulder pain and an upcoming January 25, 2008 shoulder surgery.

On January 18, 2008 appellant filed three claim forms (CA-7) for compensation for the periods October 18 through November 9, 2007, December 3, 2007 through January 15, 2008, and December 31, 2007 through January 15, 2008.

In a letter dated January 30, 2008, the Office notified appellant of the deficiencies in his claims for disability for the periods October 18 through November 9 and December 3 through 28, 2007. It indicated that medical evidence supported his claim for disability beginning December 29, 2007.

Appellant subsequently provided a medical note from Dr. Kahn dated February 4, 2008, where the doctor documented that he placed appellant off work from October 18 to 29, 2007 due to an exacerbation of his left shoulder injury. Dr. Khan also noted that appellant's surgery was scheduled for February 15, 2008.

In a February 13, 2008 initial evaluation report, the Office's nurse noted that appellant's wife had delivered a baby on December 3, 2007. In a telephone bank memorandum dated February 26, 2008, appellant contended that he should have taken family leave for the period of time when his baby was born.

On March 14, 2008 the Office issued a decision denying appellant's recurrence of disability claims for the periods October 18 through November 9 and December 3 through 28, 2007, finding that the medical evidence did not establish temporary total disability for those periods.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence establishes that 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 she cannot perform such light duty. 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 light-duty job requirements.¹

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury.² 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.³ The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁴

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. Appellant's burden of proving she was disabled on particular dates requires that she furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.⁵ Where no such rationale is present, the medical evidence is of diminished probative value.⁶

ANALYSIS

The Office accepted that appellant sustained a left shoulder injury in the performance of duty causally related to factors of his federal employment. On October 2, 2007 appellant accepted a modified position within the restrictions provided by his attending physician,

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Fereidoon Kharabi*, 52 ECAB 291 (2001). See also *David H. Gross*, 32 ECAB 24 (1980).

³ *Id.* See also *Edward H. Horton*, 41 ECAB 301 (1989).

⁴ *Id.*

⁵ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁶ *Mary A. Ceglia*, 55 ECAB 626 (2004).

Dr. Khan. This issue is whether appellant established that he was disabled during the periods October 18 through November 9 and December 3 through 28, 2007. The Board finds that appellant has not met his burden of proof in establishing disability during these periods.

In order to establish disability, appellant is required to submit rationalized medical opinion evidence establishing that he was disabled during the periods claimed.⁷ The only evidence provided by appellant in support of his claim is a February 4, 2008 medical note from Dr. Khan, documenting that he placed appellant off work from October 18 through 29, 2007 due to an exacerbation of his left shoulder injury. This note is of little probative value because it does not provide sufficient rationale explaining how appellant's left shoulder injury was exacerbated or why this exacerbation prevented appellant from working his modified duties.⁸

Moreover, the February 4, 2008 medical report directly contradicts Dr. Khan's earlier October 25, 2007 reports, finding that appellant could work eight hours a day and overtime and that he should remain in his work capacity at that time. The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence.⁹ Thus, because the October 25, 2007 reports were created contemporaneously with the period of alleged disability, they are entitled to greater probative value than the February 4, 2008 medical report created several months later. Therefore, the Board finds that appellant did not establish that he was disabled from October 18 through 29, 2007.

Appellant also failed to submit any evidence to support his claim that he was disabled from October 30 through November 9 and December 3 through 28, 2007. Furthermore, the evidence of record goes against appellant's claims of disability. The record contains two medical reports dated within the periods of alleged disability from Dr. Khan. In these reports, dated November 16 and December 18, 2007, the doctor requested authorization for continuing treatment of appellant's shoulder injury, but nowhere does he mention that appellant cannot perform his work within the restrictions already provided or that appellant is totally disabled. If appellant's condition had worsened during these times, it is presumed that these changes would be reflected in Dr. Khan's contemporaneous medical reports. Additionally, according to an initial evaluation by the Office's nurse, appellant's baby was born on December 3, 2008 and according to his own admission, in a February 26, 2008 telephone call with the Office, appellant admitted that he should have taken family leave during this period of time.

The Board finds that appellant has not established that he was disabled due to employment during the periods October 18 through November 9 and December 3 through 29, 2007.

⁷ See *supra* note 5.

⁸ See *supra* note 6. As noted above, the Office accepted appellant's claim for disability commencing October 29, 2007.

⁹ *Conrad Hightower*, 54 ECAB 796 (2003).

CONCLUSION

The Board finds that appellant did not establish periods of disability between October 18 and November 9 and December 3 through 28, 2007.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2009
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