

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

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**T.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kansas City, MO, Employer**

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**Docket No. 10-1024  
Issued: October 7, 2010**

*Appearances:*  
*Martin Kaplan, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 31, 2009 appellant, through his attorney, filed a timely appeal from a May 1, 2008 merit decision and a February 2, 2009 nonmerit decision of the Office of Workers' Compensation Programs. The Board has jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish that she was totally disabled from April 3, 2004 through December 1, 2005; and (2) whether the Office properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On August 16, 2002 appellant, then a 47-year-old mail handler, alleged injury to her neck, back, hands, shoulders and arms due to repetitive use and hand gripping in the performance of duty. The Office accepted her claim for bilateral shoulder impingement. It authorized

bilateral arthroscopic subacromial decompression and distal clavical excision on February 25, 2003. On March 9, 2003 Dr. Thomas Kelso, an attending Board-certified orthopedic surgeon, performed arthroscopic debridement of the left shoulder for a Type 1 SLAP lesion and partial thickness rotator cuff tear. He released appellant to return to light-duty work with no lifting, pushing, pulling or overhead work. Appellant returned to light-duty work following this surgery.

The Office denied appellant's claim for work-related cervical lumbar or fibromyalgia conditions causally related to her employment duties on August 15, 2003.

On September 23, 2003 Dr. Kelso performed an arthroscopic right shoulder debridement, with subacromial decompression, distal clavicle excision and mini open biceps tendon tenodesis. The employing establishment offered appellant a light-duty position on December 29, 2003 with the duties of reading manuals and working tear ups with no lifting or use of the arms above the shoulder level, no pushing or pulling. Appellant accepted this position on December 30, 2003. She returned to work on December 29, 2003 and worked five hours before using sick leave.

Dr. James T. Shaeffer, a Board-certified orthopedic surgeon, found that appellant was totally disabled on January 6, 2004. The Office expanded her claim to include left rotator cuff tear on January 22, 2004. Dr. Shaeffer performed an acromioplasty, rotator cuff debridement and repair of the left shoulder as well as injection and manipulation of her right shoulder on February 2, 2004. He released appellant to return to light-duty work four hours a day on March 22, 2004 with no use of both arms overhead and no lifting over two pounds. Dr. Shaeffer continued to support these restrictions through March 30, 2004. Appellant did not return to work on March 22, 2004. The field nurse indicated that she attempted a job site evaluation on March 30, 2004, but that appellant did not report for duty that date. Appellant filed claims for compensation, requesting wage-loss compensation from March 20, 2004 through November 25, 2005. The Office compensated her for four hours of leave without pay during this period.

Appellant's time analysis form indicated that she worked three hours a day from April 3 to 30, 2004. She then claimed eight hours of leave without pay beginning May 1, 2004.

Dr. Richard C. Lehman, a Board-certified orthopedic surgeon, examined appellant on April 27, 2004 and recommended magnetic resonance imaging (MRI) scans of both shoulders. In a separate office note he addressed her knee and back conditions. On April 27, 2004 Dr. Lehman indicated that appellant should not work for two weeks and could return to work on May 11, 2004 performing sedentary work only.

The Office referred appellant for a second opinion evaluation with Dr. Michael Clarke, a Board-certified orthopedic surgeon, on April 28, 2004. In a report dated May 17, 2004, Dr. Clarke noted that she was working three to four hours a day. He found that appellant had some loss of attachment of the deltoid muscle to the acromion and that her neurovascular status was intact. Dr. Clarke opined that she had a major psychological component to her symptoms and was addicted to multiple medications. He did not believe that appellant could work eight hours a day nor could she increase her work activities as she was "not at all motivated to return to work." Dr. Clarke found that she could walk, stand and reach for one hour a day. He also

found that appellant could reach above the shoulder only one-half hour a day. Dr. Clarke indicated that she could operate a motor vehicle up to four hours a day, as well as push, pull and perform repetitive movements of the elbow for four hours a day. He indicated that appellant could lift for two hours and climb for one hour. Dr. Clarke concluded that she could currently work four hours a day. He recommended that appellant undergo detoxification from her multiple medications and a gradual return to her work activities.

Dr. Michele D. Koo, a Board-certified plastic surgeon, examined appellant on May 5, 2004 and described her medical history. She stated that appellant was not a surgical candidate and that her symptoms and findings seemed to outweigh her physical findings. Dr. Koo opined that appellant could return to work in a limited-duty capacity lifting up to 25 pounds due to her carpal tunnel syndrome.

Dr. William D. Richardson, a Board-certified internist, completed an "excuse slip" on May 27, 2004 stating that appellant could not work from April 22 through June 14, 2004 due to chronic shoulder and hand pain. He continued complete similar notes to support disability for work through September 12, 2005.

Appellant filed a grievance on September 2, 2004 alleging that on April 1, 2004 she returned to duty on a limited basis with restrictions. Appellant requested that she be allowed to work three hours a day rather than four. She alleged that the employing establishment offered and she accepted a three-hour workday and argued that she should receive compensation benefits for five hours a day.

In a letter dated October 8, 2004, the Office informed appellant that it was unable to pay for all the hours of leave without pay requested from June 26 through July 9, 2004 and August 21 through September 3, 2004 as she had not submitted the necessary medical evidence to support total disability for the period beginning March 30, 2004. The Office noted that Dr. Richardson did not provide any medical reasoning in support of his finding of total disability and allowed appellant 30 days to submit supportive medical evidence.

Appellant filed a notice of occupational disease on October 25, 2004 alleging that she developed a back condition necessitating surgery.

Dr. Richardson provided a narrative report dated June 21, 2004 which noted appellant's history of injury and medical history. He stated that appellant's work at the employing establishment had been limited to three to four hours per night because of pain. Dr. Richardson stated that appellant was not working due to severe pain involving the shoulders, wrists and hands. He concluded that appellant was unable to "perform the essential elements of her job as a mail handler."

Dr. Richardson completed an "excuse slip" on January 20, 2005 and indicated that appellant was totally disabled through February 17, 2005 due to a chronic shoulder condition. He also attributed her disability to pain and lifting limitations, as well as her sitting tolerance. Dr. Richardson continued to support disability through March 21, 2005 stating that a chronic pain condition rendered appellant unemployable.

Dr. Thomas Pirotte, a Board-certified family practitioner, opined that appellant could work four hours a day, three days a week with restrictions on January 17, 2005. On March 7, 2005 Dr. Cary C. Marquis, a physician Board-certified in physical medicine and rehabilitation, noted appellant's medical history and previous employment duties. He recommended additional testing for carpal tunnel syndrome symptoms. Dr. Marquis completed a report on May 9, 2005 and discussed appellant's back and shoulder conditions. He recommended physical therapy for her upper back and cervical neck strain. In a report dated July 6, 2005, Dr. Marquis stated that appellant required physical therapy for her shoulders as this condition was contributing to her upper back and neck pain. On August 31, 2005 Dr. Marquis diagnosed cervical dystonia and recommended Botox injections. He stated that appellant was disabled until October 11, 2005 on August 31, 2005. Dr. Marquis supported appellant's total disability through November 9, 2005. In a note dated October 13, 2005, he stated that appellant had upper back, neck and right shoulder pain as well as bilateral hand pain. Dr. Marquis recommended additional diagnostic testing.

Dr. Richardson completed an "excuse slip" on September 12, 2005 and found that appellant could not work until October 18, 2005. He completed a similar note on October 18, 2005 supporting disability until November 17, 2005. Dr. Richardson found appellant was totally disabled through December 15, 2005.

Dr. Clark examined appellant on October 21, 2005 for the Office and reviewed her medical history. He opined that appellant's primary medical issue was fibromyalgia as she had no significant benefit from her multiple shoulder operations. Dr. Clark stated that appellant was addicted to OxyContin, but that she had minimal impairment. He stated that he believed that appellant could return to her mail handler position, but that she had significant psychological overlay. Dr. Clark stated that appellant could work eight hours a day after rehabilitation and detoxification.

The Office of Personnel Management (OPM) approved appellant for disability retirement effective November 7, 2005. She elected to receive retirement benefits effective December 1, 2005.

Dr. Marquis examined appellant on November 9, 2005 and reported that she experienced pain in her upper back and arms, right shoulder and hands. He noted that appellant's electrodiagnostic studies showed improvement in her median motor and sensory latencies. Dr. Marquis examined appellant on January 11, 2006 and stated that appellant was unlikely to make further gains with conservative management or surgical intervention. He stated that appellant had reached maximum medical improvement.

In a report dated December 5, 2005, Dr. Clark opined that appellant had permanent impairment of her upper extremities due to loss of range of motion of the shoulder. On January 21, 2006 the Office granted appellant schedule awards for eight percent impairment of her right upper extremity and five percent impairment of her left upper extremity.

In a letter dated June 20, 2007, the Office acknowledged that appellant had submitted claims for compensation requesting payment from November 7 through 30, 2005. It noted that appellant retired effective November 7, 2005 and elected OPM benefits on that date. The Office

stated that appellant was entitled to compensation for four hours a day as the medical evidence supported that she could work four hours a day. On August 28, 2007 appellant elected to return to the Office rolls effective October 10, 2006. The OPM was not able to terminate those benefits until February 29, 2008.

In a letter dated January 31, 2008, appellant's attorney alleged that appellant's work restrictions included no use of both arms overhead and a two-pound weight restriction. He noted that appellant could work four hours a day within these restrictions. Counsel alleged that the employing establishment had not offered appellant appropriate light-duty work and that the Office could not limit her compensation based on a wage-earning capacity determination and had no authority to unilaterally reduce her compensation benefits. He requested eight hours of compensation for the period April 4, 2004 through December 1, 2005.

By decision dated May 1, 2008, the Office denied appellant's claim for continuing compensation beginning March 3, 2004. It noted that Dr. Shaeffer released appellant to return to light-duty work on March 3, 2004 four hours a day. The Office stated that appellant returned to light-duty work on March 31, 2004 and that she filed a grievance requesting a three hour a day assignment. It concluded that appellant was not entitled to compensation for eight hours a day from April 4, 2004 to the present.

Counsel requested a review of the written record on May 15, 2008. He stated that appellant was partially disabled and that the employing establishment failed to make an appropriate offer of light duty until July 23, 2006. Counsel submitted a similar letter on the same date and requested reconsideration. By decision dated February 2, 2009, the Office denied appellant's request for reconsideration on the grounds that the request for reconsideration neither raised substantive legal questions nor included new and relevant evidence.

On appeal, counsel alleged that appellant was entitled to compensation for partial disability until there was a suitable job offer or until a loss of wage-earning capacity determination was made. He stated that the employing establishment did not offer appellant an appropriate light-duty position and that she was therefore entitled to compensation for eight hours a day. Counsel further alleged that he raised a new point of law with the request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

A recurrence of disability is 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 which caused the illness. The 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, nonperformance 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.<sup>1</sup>

A recurrence of disability is 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 which caused the illness. The 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, nonperformance 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.<sup>2</sup> 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 establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted appellant's claim for bilateral shoulder impingement and authorized surgery. Appellant underwent shoulder surgery on March 19, 2003 and returned to light-duty work. Dr. Kelso, a Board-certified orthopedic surgeon, performed an additional shoulder surgery on September 23, 2003 and the employing establishment offered appellant a light-duty position on December 29, 2003 which she accepted and returned to work for five hours on that date. The Office then expanded appellant's claim to include the additional condition of left rotator cuff tear and appellant had additional surgery on February 2, 2004. On March 22, 2004 appellant's

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<sup>1</sup> 20 C.F.R. § 10.5(x).

<sup>2</sup> *Id.* at § 10.5(x).

<sup>3</sup> *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>4</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>5</sup> *Id.*

physician, Dr. Shaeffer, a Board-certified orthopedic surgeon, released appellant to return to work four hours a day with restrictions of no use of both arms overhead and no lifting over two pounds. The record indicates that appellant returned to light-duty work on April 1, 2004 and that her position description required her to work four hours a day. Appellant's time analysis forms establish that she worked part time from April 3 to 30, 2004. Appellant, through her attorney, requested eight hours of compensation for the period April 4, 2004 through December 1, 2005.

Appellant returned to light-duty work on April 3, 2004 and worked in a light-duty position until April 30, 2004. She has in essence claimed a recurrence of total disability such that she can no longer perform her light-duty position after April 30, 2004. In support of her claim for total disability, appellant submitted a note dated April 27, 2004 from Dr. Lehman, a Board-certified orthopedic surgeon, who opined that appellant should not work for two weeks and could return to work on May 11, 2004 performing sedentary work. She also submitted a series of notes from Dr. Richardson, a Board-certified internist, who found that appellant could not work beginning April 22, 2004 due to chronic shoulder and hand pain. Appellant submitted notes from Dr. Marquis, a physician Board-certified in physical medicine and rehabilitation, supporting total disability beginning August 31, 2005. These notes are not sufficient to establish appellant's total disability for work as neither Dr. Lehman, Dr. Richardson nor Dr. Marquis offered findings supporting appellant's inability to work, provided an opinion that appellant's disability was due to her accepted employment injury and provided clear restrictions.

The Office referred appellant to Dr. Clarke, a Board-certified orthopedic surgeon, for a second opinion evaluation on April 28, 2004. In his May 17, 2004 and October 21, 2005 reports, Dr. Clarke concluded that appellant could work at least four hours a day with restrictions on walking, standing, reaching and reaching above the shoulder. He did not support appellant's claim for total disability and his report was detailed and based on a proper history of injury. Dr. Koo, a Board-certified plastic surgeon, also supported that appellant could work limited duty, lifting up to 25 pounds. Dr. Pirotte, a Board-certified family practitioner, opined that appellant could work four hours a day.

Appellant submitted an additional report from Dr. Richardson dated June 21, 2004 including appellant's history of injury and medical history. He found that appellant could work only three to four hours per night because of pain. Dr. Richardson concluded that appellant was unable to "perform the essential elements of her job as a mail handler." This report is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability as Dr. Richardson merely restated appellant's complaints of pain. As noted above, findings on examination must be included to support a finding of disability. In this case, Dr. Richardson merely offered a repetition of appellant's complaints that she hurts too much to work, and did not provide objective signs of disability and has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>6</sup>

The Board finds that appellant has not submitted sufficient detailed medical evidence to establish a period of total disability on or after April 30, 2004 due to her accepted employment

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<sup>6</sup> *Kharabi, supra* note 4.

injuries. The Board finds that the Office properly denied appellant's claim for total disability beginning April 4, 2004.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

In support of the May 15, 2008 request for reconsideration, appellant's attorney alleged that appellant was partially disabled and that the record established that the employing establishment had failed to make an appropriate light-duty job offer until July 23, 2006. The record does not support the legal contention that appellant had not received an appropriate light-duty job offer. It is clear that appellant returned to light-duty work on April 3, 2004 and worked until April 30, 2004. Therefore, appellant's return to work for a month establishes that the light-duty position was appropriate and she bears the burden of proof following her work stoppage in establishing a recurrence of disability as discussed in the preceding analysis. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>10</sup> The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on February 2, 2009.

### **CONCLUSION**

The Board finds that as appellant returned to a light-duty position for a month, she bears the burden of proof in establishing that she sustained a recurrence of disability rendering her totally disabled. The Board further finds that appellant has not met her burden of proof in establishing total disability on or after April 3, 2004. The Board also finds that the Office properly declined to reopen appellant's claim for consideration of the merits.

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<sup>7</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *Jennifer A. Guillary*, 57 ECAB 485, 489 (2006).



**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2009 and May 1, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 7, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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