

FACTUAL HISTORY

This is the second appeal in the present case. In a March 9, 2011 decision, the Board affirmed a February 16, 2010 OWCP decision, finding that appellant failed to meet his burden of proof to establish that he sustained certain cervical disc conditions causally related to his September 4, 2004 work injury.² The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.³

Appellant came under the treatment of Dr. Robert J. Takacs, a Board-certified orthopedic surgeon, from June 5 to August 18, 2003. Dr. Takacs noted that appellant had right arm, leg and neck problems since the September 4, 2001 work injury. He diagnosed herniated disc at C4-5 and recommended an anterior cervical discectomy and fusion, which OWCP authorized and was performed on June 10, 2003. In a July 24, 2003 report, Dr. Takacs noted that appellant was making good progress after surgery. He diagnosed healed spinal fusion of the neck and released appellant to full-time light-duty work on August 2, 2003 with lifting limited to 10 pounds and no overhead work. On August 13, 2003 Dr. Takacs clarified that appellant was limited to working seated at a table with the work in front of him with no excessive flexing or extension of his neck.

On August 2, 2003 the employing establishment offered appellant a light-duty position as a mail handler, eight hours per day, from 7:00 a.m. to 3:30 p.m. effective that date. The duties included sorting letters, flats on a belt subject to restrictions of no lifting over 10 pounds and no overhead work. Appellant accepted the position.

In reports dated October 13 and 27, 2003, Dr. Takacs noted that x-rays revealed appellant's cervical spine fusion at C4-5 was solidly in place both superiorly and inferiorly. In an October 27, 2003 work capacity evaluation, he noted that appellant could work full time with permanent restrictions of no frequent overhead shoulder work, lifting from the floor limited to 35 pounds, from waist 20 pounds and overhead lifting up to 20 pounds. On November 28, 2003 Dr. Takacs noted that appellant had minimal pain after surgery, full range of neck motion and normal neurological examination. He advised that, based on a functional capacity evaluation, appellant had permanent restrictions on lifting more than 35 pounds from the floor, lifting more than 25 pounds from the waist, lifting more than 20 pounds overhead and no frequent overhead work. Dr. Takacs noted that appellant fell within a light to medium physical demand level of work and had reached maximum medical improvement. On December 8, 2003 he noted that appellant was limited to an eight-hour day.

Appellant sought treatment from Dr. William O. Reed, Jr., a Board-certified orthopedic surgeon. In reports dated May 11 and June 3, 2004, Dr. Reed treated appellant for right arm pain postsurgery. Appellant had normal sensory and motor function in the upper extremities and intact reflexes. Dr. Reed noted an MRI scan of the cervical spine did not reveal abnormalities which would cause arm pain. He diagnosed persistent radiculopathy of the right arm following

² On September 4, 2001 appellant, a 43-year-old mail handler, was injured while pushing and pulling all purpose containers. OWCP accepted cervical strain and a herniated disc at C4-5. Appellant also has a claim accepted for left carpal tunnel syndrome in file number xxxxxx882.

³ Docket No. 10-1101 (issued March 9, 2011).

surgery and continued his work restrictions. On July 19, 2004 Dr. Reed noted an electromyogram (EMG) revealed chronic radiculopathy on the left. He believed this to be a transient condition that could be due to surgery. Dr. Reed stated that the right arm pain was improving, “not terribly bothersome” and that continued improvement was expected.

On September 15, 2005 appellant telephoned OWCP and noted that he currently received an annuity from the Office of Personnel Management (OPM) but advised that he wanted to apply for wage-loss compensation. He asserted that the employing establishment was unable to accommodate him. OWCP asked appellant to file a claim for a recurrence of disability. Appellant reiterated his assertions in a January 4, 2006 telephone call. In a January 8, 2006 e-mail, he asked for compensation for scarring.

On January 27, 2006 appellant submitted a CA-7, claim for compensation for the period starting June 2004. The employing establishment noted that appellant stopped work and accepted a disability retirement effective on June 7, 2004.

In a February 6, 2006 letter, OWCP advised appellant of the factual and medical evidence needed to establish his recurrence claim. In a February 7, 2006 letter, appellant stated that he was never offered a light-duty job. On February 11, 2006 he indicated that he was not working a light-duty job and he stopped work because of a worsening condition; rather, he stopped because he was unable to perform his mail handler duties. Appellant noted that his disability did not allow him to perform his mail handler duties and he was not offered other suitable work.

In a decision dated April 19, 2006, OWCP denied appellant’s claim for wage loss finding that the evidence did not establish that his disability for work was caused by his accepted injury.

On April 19, 2006 appellant requested an oral hearing which was held on August 9, 2006. He submitted reports from Dr. Curtis D. Johnson, a Board-certified orthopedic surgeon, dated August 11 to October 17, 2006. Appellant was treated for neck and shoulder pain. Dr. Johnson diagnosed status post C4-5 cervical fusion, multilevel degenerative disc disease of the cervical spine, myofascial pain and failed neck syndrome and recommended physical therapy and trigger point injections. A September 25, 2006 cervical spine MRI scan revealed a solid interbody fusion at C4-5, mild degenerative central canal stenosis at C3-4, C4-5, mild degenerative bilateral foraminal stenosis at C3-4 with no disc protrusion or extrusion.

In an October 20, 2006 decision, the hearing representative affirmed the April 19, 2006 decision. He found that the evidence failed to establish appellant’s claim for recurrence of disability beginning June 2004. The hearing representative did not establish a change in the nature of the light-duty position or a change in the nature and extent of appellant’s work-related condition.

On June 7, 2010 appellant filed a Form CA-7, claim for compensation, for the period June 20, 2004 to June 7, 2010 for “loss of job.” In a June 23, 2010 letter, OWCP requested additional information. It noted that appellant’s disability retirement was effective on June 7, 2004. At that time, appellant had permanent restrictions from Dr. Takacs and had accepted a light-duty job in February 2004. OWCP requested that appellant address why he stopped work on June 7, 2004.

The employing establishment noted that appellant accepted disability retirement on June 7, 2004 and, at that time, he was working under Dr. Takacs' October 27, 2003 restrictions. Appellant accepted a modified assignment within these restrictions. OWCP requested that the employing establishment confirm if the limited-duty job would remain available. In a June 23, 2010 e-mail, the employer advised that limited-duty work within appellant's work restrictions would have remained available to appellant had he not retired on June 7, 2004.

In a July 4, 2010 letter, appellant noted that he turned down three or four modified assignments because they were not within his permanent restrictions. He contended that the employing establishment was not complying with his doctor's orders.

In a decision dated July 28, 2010, OWCP denied appellant's claim for wage-loss compensation as of June 7, 2004. It noted that when he accepted disability retirement, he was working limited duty within his work restrictions which would have remained available had he not voluntarily retired. OWCP found no evidence to establish that appellant was unable to perform the physical requirements of the modified mail handler position.

On September 13, 2010 appellant filed a claim for a schedule award for facial disfigurement. OWCP notified him that he might be eligible for a schedule award of up to \$3,500.00 for facial disfigurement. It provided appellant with the appropriate application and a medical form for his physician to complete. Appellant requested an oral hearing which was held on November 3, 2010.

On October 5, 2010 appellant submitted a disfigurement award application, including photographs of his face. He stated that his disfigurement was due to a surgical procedure which left a 2¼ inches long and ½ inch wide scar on his neck and noted the scar area was darker than his normal skin tone. Appellant noted that the surgery resulted in his retirement from the employing establishment. When applying for jobs, he was asked about his scar and was asked to undergo a physical examination which he failed. On May 5, 2010 Dr. Leslie Wiscombe, an osteopath, stated that appellant's neck disfigurement would not improve. She stated that the scar was 8 millimeters wide and 50 millimeters long and was dark and discolored located in the left submandibular area. Appellant submitted three color photographs of his neck.

On October 21, 2010 OWCP forwarded appellant's file to an OWCP medical adviser. On November 12, 2010 the medical adviser reviewed the medical record and photographs. He noted that, to even see the scar as a consequence of the cervical surgery, appellant has to extend the neck at a 30 degree angle which was not the normal carrying angle of the head on the neck. The medical adviser noted that the scar was mildly hyperpigmented but at the normal carrying angle of the head would be hardly noticeable. He noted that to be considered for a schedule award, the disfigurement of the head, face or neck must be of a character that was likely to handicap appellant in seeking or maintaining employment. The medical adviser noted that appellant's scar would have minimal impact on obtaining or maintaining employment. He recommended a schedule award of \$50.00 for the surgical scar.

In a November 23, 2010 decision, OWCP granted appellant a schedule award for \$50.00 facial disfigurement. On November 30, 2010 appellant requested an oral hearing which was held on April 14, 2011.⁴

Following the November 3, 2010 hearing on appellant's wage-loss claim, the employer submitted a November 30, 2010 letter that reiterated he was provided a modified job according to his physical restrictions. It disputed appellant's assertion that he worked at his full duties. The employer advised that appellant was instructed by his manager not to exceed his doctor's restrictions. It noted that appellant's modified job assignment would still be available had he not retired in June 2004.

In a decision dated January 11, 2011, an OWCP hearing representative affirmed the July 28, 2010 decision denying appellant's claim for a recurrence of disability beginning June 7, 2004.

In a decision dated June 28, 2011, an OWCP hearing representative affirmed the November 23, 2010 disfigurement schedule award. The hearing representative reviewed the photographs of the scar and found that it was not a serious disfigurement that would handicap appellant in securing or maintaining employment.

LEGAL PRECEDENT -- ISSUE 1

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 of record establishes that he 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 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 requirements.⁵

OWCP's regulations define 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."⁶

⁴ At the hearing, appellant's counsel questioned whether a District Director or Assistance District Director of OWCP properly reviewed the matter and concurred in the award. The hearing representative asserted, at the hearing, that a District Director agreed with the award but the record contains no document from a District Director concurring with the medical adviser's opinion on impairment due to scarring.

⁵ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ 20 C.F.R. § 10.5(x); *J.F.*, 58 ECAB 124 (2006); *Elaine Sneed*, 56 ECAB 373, 379 (2005); 20 C.F.R. § 10.5(x).

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁷

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for cervical strain and a herniated disc at C4-5. It authorized an anterior cervical discectomy and fusion and left iliac crest bone excision which was performed on June 10, 2003. Following this surgery, Dr. Takacs released appellant to full-time limited-duty work. On October 27, 2003 he provided permanent restrictions and on November 28 and December 8, 2003 he reiterated appellant's restrictions. There is no contemporaneous evidence of record indicating that the employer did not provide work in compliance with Dr. Takacs' restrictions. Appellant accepted retirement disability on June 6, 2004. On June 7, 2010 he claimed compensation for total disability beginning in June 2004 which OWCP developed as a recurrence of disability claim. In the instant case, appellant has not submitted sufficient evidence to support 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.

Reports from Dr. Takacs predate the beginning of the claimed period of disability. His reports, as noted, following appellant's surgery indicated that appellant could work full time within restrictions. Dr. Takacs' reports most contemporaneous with the beginning of the claimed period of disability do not offer any opinion that appellant was either totally disable or disabled from working his light-duty job on or about June 7, 2004. Reports from Dr. Reed dated May 11 and June 3, 2004, noted treatment for right arm pain postcervical surgery and continued his work restrictions. On July 19, 2004 Dr. Reed opined that appellant's condition was "not terribly bothersome" and continued improvement was expected. He provided no opinion that appellant was either totally disabled or unable to perform his modified duties on or after June 7, 2004. These reports are insufficient to establish that appellant had work-related disability beginning June 7, 2004. Instead, they indicate that appellant could continue to work full time within his restrictions.

Reports from Dr. Johnson from August 11 to October 17, 2006, noted appellant's treatment for neck and shoulder pain status post cervical fusion at C4-5. Dr. Johnson diagnosed status post C4-5 cervical fusion, multilevel degenerative disc disease of the cervical spine, myofascial pain and failed neck syndrome. However, he does not specifically address how appellant sustained a change in the nature and extent of his injury-related condition such that he could not perform his light-duty job on or after June 7, 2004. There is no other medical evidence of record substantiating that appellant was totally disabled or was unable to perform his limited-duty work beginning June 7, 2004 due to his accepted conditions.

The Board also finds that there is no credible evidence which substantiates that there was a change in the nature and extent of appellant's light-duty requirements or that he was otherwise required to perform duties which exceeded his medical restrictions.

⁷ *M.D.*, 59 ECAB 211 (2007).

On his June 7, 2010 Form CA-7 appellant claimed compensation for “loss of job.” In a July 4, 2010 letter, he noted that he turned down three or four modified assignments because they were not within his permanent restrictions. Appellant noted that the employer did not comply with his doctors orders. However, there is no evidence establishing that any particular duty that he actually performed exceeded his work restrictions or the employer did not provide him with appropriate work within his restrictions. The record reveals that appellant voluntarily accepted disability retirement on June 7, 2004 and at the time of retirement he was working under restrictions, as noted, from Dr. Takacs. Appellant accepted the modified assignment within those restrictions and performed that position until the time of his retirement. On June 23 and November 30, 2010 the employer confirmed that the limited-duty work was within his work restrictions and would have remained available to him had he not chosen to retire on June 7, 2004.

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-duty requirements that prevented him from working beginning June 7, 2004.

LEGAL PRECEDENT -- ISSUE 2

FECA provides in section 8107(c)(21) that, for serious disfigurement of the face, head or neck of a character likely to handicap an individual in securing or maintaining employment, proper and equitable compensation not to exceed \$3,500.00 shall be awarded in addition to any other compensation payable under this schedule.⁸ In a case involving facial disfigurement, the question before the Board is whether the amount awarded by OWCP was based upon sound and considered judgment and was proper and equitable under the circumstances as provided by section 8107(c)(21) of FECA.⁹ As the only limitation on OWCP’s authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions that are contrary to both logic and probable deduction from established facts.¹⁰ The Board will not interfere with or set aside a disfigurement determination of OWCP unless it is clearly in error.¹¹

OWCP’s procedures provide:

“d. *OWCP Medical Evaluation.* After the CE has gathered the required evidence, the case will be referred to the [d]istrict [m]edical [a]dviser (DMA). The DMA will review the photographs submitted along with the medical evidence of record and place a memorandum in the file describing the disfigurement and stating whether maximum improvement has occurred. If not, final action on the application for disfigurement will be deferred.”

⁸ 5 U.S.C. § 8107(c)(21).

⁹ *Hylan Shelton*, 57 ECAB (2006).

¹⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹¹ *Matthew Leonka*, 38 ECAB 119, 121 (1986).

If the DMA finds maximum improvement has occurred, the concurrence of the Assistant District Director or the District Director must be obtained. The parties evaluating the disfigurement will place a memorandum in the file which states their findings and decision with supporting rationale. The case will then be returned to the claims examiner for payment of the award or denial of the application.¹²

ANALYSIS -- ISSUE 2

A review of the case record shows that OWCP failed to follow its procedures. On October 5, 2010 appellant submitted a disfigurement award application. On November 12, 2010 the medical adviser reviewed the medical record and photographs. He found that the scar was mildly hyperpigmented but, at the normal carrying angle of the head, would be hardly noticeable. The medical adviser opined that the scar would have minimal impact on obtaining or maintaining employment. He recommended a schedule award of \$50.00 for the surgical scar. On November 23, 2010 OWCP granted appellant a schedule award for \$50.00 facial disfigurement. The Board notes that, after the medical adviser reviewed appellant's claim, OWCP did not refer the case to an Assistant District Director or the District Director for review as contemplated by OWCP procedures.¹³ Rather, the determination of appellant's disfigurement schedule award was based solely upon the medical adviser's review of the medical records and inspection of the photographs. As noted, OWCP procedures provide that the concurrence of the Assistant District Director or the District Director must be obtained. Although the hearing representative indicated at the April 14, 2011 hearing that a District Director had concurred in the award, the record contains no such evidence from the District Director regarding the award. Therefore, the case will be remanded to OWCP for further development consistent with this decision to be followed by an appropriate decision regarding appellant's entitlement to a schedule award for disfigurement.¹⁴

On remand OWCP should follow its procedures in evaluating appellant's impairment for facial disfigurement. After conducting necessary development, OWCP should issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability beginning June 7, 2004. The Board finds that the case not in posture for decision with regard to his schedule award claim for disfigurement.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.8 (January 2010); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.5 (January 2010).

¹³ *Supra* note 12.

¹⁴ *See Lon E. Grinage, 57 ECAB 177 (2005)* (where the Board found that OWCP did not follow its procedures when it evaluated a claimant's impairment due to disfigurement when it failed to refer a photograph to the medical adviser for review and obtain the concurrence of the Assistant District Director or the District Director).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed. The June 28, 2011 decision is set aside and the case remanded for further development in conformance with this decision.

Issued: April 9, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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