

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

T.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bedford Park, IL, Employer**

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**Docket No. 11-1916
Issued: June 7, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 23, 2011 appellant filed a timely appeal from a July 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant established a recurrence of total disability commencing January 11, 2010 causally related to an accepted employment injury.

On appeal, appellant contends that the medical evidence she submitted established that she was having spasms and a magnetic resonance imaging (MRI) scan showed that her

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the July 18, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

employment injury worsened to the point that she required surgery on January 10, 2011. She noted that an independent medical examiner recommended a referral to an orthopedic spine surgeon.

FACTUAL HISTORY

On December 9, 2008 appellant, then a 46-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed pain and swelling in her left arm, shoulder, elbow, wrist and thumb due to factors of her federal employment, including lifting, pushing and pulling. OWCP accepted the claim for brachial neuritis or radiculitis, bilateral medial epicondylitis, bilateral lateral epicondylitis and cervical myositis with left upper extremity radiculopathy.

On December 3, 2009 appellant accepted an offer of limited-duty work effective December 1, 2009 as a modified mail handler with the following restrictions: an average of four to six hours of walking, standing, bending, stooping; an average of four hours of grasping up to 15 pounds; and an average of four to six hours of pushing, pulling and/or lifting up to 15 pounds.

In a December 7, 2009 report, Dr. Theodore J. Suchy, a second opinion referral osteopath Board-certified in orthopedic surgery, diagnosed cervical myositis with left upper extremity radiculopathy secondary to degenerative disc disease and spondylosis of the cervical spine; left shoulder rotator cuff tendinitis, resolved and left lateral epicondylitis, resolved. He opined that there was a causal relationship between appellant's work as a mail handler and the development of left shoulder rotator cuff tendinitis and a left elbow lateral epicondylitis. However, appellant had reached maximum medical improvement as both of those conditions had resolved and could perform her regular duties without restrictions with regard to her left shoulder and left elbow. Dr. Suchy opined that her cervical myositis with a left upper extremity radiculopathy also had a causal relationship to her duties as a mail handler, which had not resolved. He restricted appellant from lifting over 15 pounds and no overhead work.

On January 7, 2010 appellant filed a claim for disability for the period December 15 to 23, 2009 as the employing establishment could not accommodate eight hours a day of work. OWCP paid compensation for the period claimed.

Appellant submitted off-work slips with illegible signatures dated January 4 and 19, February 16 and April 12, 2010.

Appellant filed claims for compensation (Form CA-7) for intermittent periods commencing January 11, 2010.

In an undated report, Dr. Harold Pye, an occupational medicine physician, indicated that in January 2010 appellant experienced severe cervical radiculitis, bilateral upper extremity pain and muscle spasms aggravated by performing the essential functions of her job as a mail handler. He reported that the complaints of cervical radiculitis occurred despite having attempted to modify her work restrictions on several occasions. Dr. Pye indicated that appellant's job duties required kneeling, stooping, squatting, repetitive bending and twisting at the waist, repetitive lifting, pushing, pulling and carrying 18 to 20 pounds. He diagnosed cervical herniated disc

C5-6, cervical stenosis/cervical radiculitis, left shoulder tendinitis and impingement syndrome, trapezius myositis, bilateral medial and lateral epicondylitis and bilateral early carpal tunnel syndrome. Dr. Pye opined that it was absolutely necessary to remove appellant from work in order to treat her cervical pain and spasms.

In an April 26, 2010 off-work slip, Dr. Kevin M. Hilton, a Board-certified orthopedic surgeon, diagnosed cervical radiculopathy and excused appellant from work for the period April 20 to May 6, 2010. On May 10, 2010 he diagnosed resolved right distal radius fracture, C5-6 cervical disc herniation, bilateral elbow epicondylitis, left shoulder bursitis and cervical radiculitis. Appellant's right wrist demonstrated mild focal tenderness with deep dorsiflexion of the wrist. She had no focal pain on the right upper extremity at the joints of her thumb or fingers. On May 24, 2010 Dr. Hilton reiterated his diagnosis of cervical radiculitis C5-6 disc herniation.

Appellant submitted physical therapy notes dated June 23, 2009 to August 30, 2011.

OWCP found a conflict in the medical opinion between Drs. Pye and Suchy and referred appellant to an impartial medical examiner. In a June 15, 2010 report, Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, reviewed appellant's medical history and performed a physical examination on May 5, 2010. He found that she did have some acquired spinal stenosis of the cervical spine that had not responded well to epidural steroid and therapy. Appellant's left shoulder rotator cuff tendinitis had resolved and her left lateral epicondylitis was not clinically significant based on examination findings. Dr. Komanduri disagreed with Dr. Pye and concluded that appellant was not totally disabled. He indicated that she clearly had a number of soft tissue complaints, but they did not restrict her significantly and she had minimal findings on physical examination to support total disability. Dr. Komanduri advised that a light-duty restriction with a 20-pound weight limit was reasonable and appropriate and also suggested that she avoid repetitive overhead lifting. He opined that appellant was capable of performing a modified mail handler position. Dr. Komanduri recommended referring her to an orthopedic spine surgeon to determine whether surgical management was appropriate. He opined that appellant had not reached maximum medical improvement.

By decision dated June 16, 2010, OWCP denied appellant's recurrence claim on the basis that the evidence she submitted was not sufficient to establish that she was unable to perform light-duty work due to her accepted conditions. That same day, the employing establishment informed OWCP that the job offer dated December 1, 2009 was still available to her as it was her bid assignment.

Appellant submitted a June 7, 2010 report by Dr. Hilton who diagnosed cervical radiculitis with C5-6 disc herniation and bilateral lateral epicondylitis. Dr. Hilton also wrote an off-work note dated June 7, 2010.

In a June 28, 2010 report, Dr. Hilton diagnosed stable left elbow lateral epicondylitis and released appellant to work with a 15-pound overhead weight restriction for an average of five hours a day of standing, climbing, stooping and bending.

On July 30, 2010 appellant requested reconsideration and submitted additional evidence in support of her claim. She submitted an April 26, 2010 report by Dr. Hilton who diagnosed cervical radiculopathy at C5-6 and took appellant formally off work and a July 26, 2010 report by Dr. Hilton indicating that he took her off work on April 26, 2010 and that she had been taken off work from January 11 to July 7, 2010 by Dr. Pye. Dr. Hilton released appellant to return to work on July 7, 2010 with restrictions.

On August 12, 2010 appellant accepted a job offer from the employing establishment as a limited-duty mail handler for one hour each day with the following restrictions: an average of one hour per day of simple grasping, fine manipulation and lifting, not to exceed 10 pounds.

In an August 16, 2010 report, Dr. Hilton reiterated his diagnoses and noted that appellant was on a 10-pound work restriction.

On September 7, 2010 appellant filed a notice of recurrence (Form CA-2a) indicating that the employing establishment could not accommodate her restrictions effective that day and no longer had work for her due to the National Reassessment Process (NRP).

In a September 13, 2010 report, Dr. Hilton reiterated his diagnoses and opined that appellant was still able to work within her restrictions up to four hours a day.

On September 23, 2010 Dr. George S. Miz, a Board-certified orthopedic surgeon, indicated that appellant was currently off work as her employer could not accommodate her restrictions. He diagnosed persistent cervical radiculopathy related to her C5-6 disc herniation and recommended surgical intervention.

On October 20, 2010 OWCP authorized neck spine surgery.

In a December 16, 2009 report, Dr. Donald E. Roland, a Board-certified anesthesiologist, diagnosed radicular syndrome upper limbs, intervertebral disc displacement cervical and cervical disc disorder displacement. He indicated that appellant was referred by Dr. Pye with complaints of pain in the neck, left shoulder, arm and hand for the past year. Dr. Roland reported that appellant worked at a post office which required lots of lifting and pulling.

On October 18, 2010 Dr. Hilton reiterated his diagnosis and reported that an October 1, 2010 MRI scan was consistent with a left-sided C5-6 paracentral disc herniation.

By decision dated November 5, 2010, OWCP denied modification of its June 16, 2010 decision, finding that the evidence submitted did not establish appellant's claim for recurrence commencing January 11, 2010. It noted that she lost time from work due to the NRP.

On November 18, 2010 Dr. Miz reported that an MRI scan confirmed persistent C5-6 disc herniation in a position to cause root impingement.

In a November 29, 2010 report, Dr. Hilton indicated that appellant's cervical radiculitis was exacerbated by bending over and sorting mail on a repetitive basis at work. He indicated that her symptoms were slightly improved by being off work and then working within restrictions.

On December 13, 2010 Dr. Hilton addressed appellant's work status from December 15, 2009 to July 7, 2010. On December 15, 2009 appellant was working a one-hour modified-duty position. On January 11, 2010 she was taken off work by Dr. Pye secondary to rest for increasing spasms and for cervical epidural injections. Appellant was released back to work on July 7, 2010 with a one-hour time restriction. She experienced symptoms of cervical radiculitis with pain radiating from her left shoulder down into her elbow brought on by bending over and sorting mail at work on a repetitive basis.

On January 10, 2011 Dr. Miz performed anterior cervical decompression and fusion surgery at C5-6.

In a January 11, 2011 report, Dr. Bruce Parisi, a Board-certified family medicine physician, indicated that appellant was put in a collar and discharged home after surgery.

On January 27, 2011 appellant requested reconsideration and submitted progress notes by Dr. Miz dated January 27 to June 30, 2011 indicating that she was not capable of work during that period of time.

By decision dated July 18, 2011, OWCP denied modification of the November 5, 2010 decision finding that the medical evidence submitted was insufficient to establish that appellant sustained a recurrence of disability due to a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the employment-related condition.

LEGAL PRECEDENT

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."³

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

³ 20 C.F.R. § 10.5(x).

change in the nature and extent of the light-duty requirements.⁴ To establish a change in the 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.⁵

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a wage-earning capacity decision has not been issued, the Bulletin provides:

“1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating (or the CE [claims examiner] has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the [Form] CA-7 as long as the following criteria are met --

The current medical evidence in the file (within the last 6 months) establishes that the injury[-]related residuals continue;

The evidence of file supports that light duty is no longer available; and

There is no indication that a retroactive LWEC determination should be made. (Note -- Retroactive LWEC determinations should not be made in these NRP cases without approval from the [d]istrict [d]irector).”⁶

The Bulletin also states that, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from the employing establishment and the claimant.⁷

ANALYSIS

Appellant filed claims for disability commencing January 11, 2010 and a notice of recurrence on September 7, 2010. The record indicates that her light-duty job was withdrawn pursuant to the NRP process. The guidelines for evaluating a claim for total disability under these circumstances are noted above in FECA Bulletin 09-05,⁸ but in this case OWCP failed to

⁴ See *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ See *Maurissa Mack*, 50 ECAB 498 (1999).

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁷ *Id.*

⁸ The bulletin refers to a Form CA-7, claim for compensation, but the Form CA-2a, claim for a recurrence of disability, also represents a claim for total disability.

discuss FECA Bulletin No. 09-05 or properly consider the evidence presented in light of the guidelines contained in the bulletin before issuing its July 18, 2011 decision.

It is well established, as noted above, that a withdrawal of a light-duty position is considered a recurrence of disability under OWCP regulations. The guidance from FECA Bulletin 09-05 notes that OWCP should consider whether the current medical evidence established that appellant had continuing employment-related residuals at the time of the withdrawal of the light-duty position. If the medical evidence is not sufficient, OWCP should request additional evidence.⁹

OWCP failed to properly follow the guidelines in FECA Bulletin 09-05. The July 18, 2011 OWCP decision denying the claim for compensation did not refer to FECA Bulletin No. 09-05 or mention that there was a withdrawal of appellant's light-duty position under NRP.¹⁰ OWCP did not properly review the medical evidence of record in light of the withdrawal of the light-duty position. If no LWEC decision is in place, OWCP evaluates the medical evidence to determine if the current evidence establishes that the employment-related residuals continue and, if the medical evidence is not sufficient, the claims examiner should request current medical evidence from both the claimant and the employing establishment.¹¹ Entitlement to wage-loss compensation would be established if the current evidence establishes employment-related residuals continue, the light duty is no longer available and there is no indication that a retroactive LWEC determination should be made.¹²

Accordingly, the case will be remanded to OWCP for further consideration. After such further development as OWCP deems necessary, it should issue a *de novo* decision with proper findings on the issue presented.

CONCLUSION

The Board finds that the case must be remanded to OWCP for proper findings on the issue presented.

⁹ It would be OWCP's burden of proof to show that employment-related residuals had ceased. See *Joseph Roman*, 55 ECAB 233 (2004); *J.A.*, Docket No. 11-1592 (issued February 13, 2012).

¹⁰ See *R.K.*, Docket No. 11-1048 (issued January 25, 2012).

¹¹ See *supra* note 9.

¹² See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 18, 2011 is set aside and the case remanded for further actions consistent with this decision of the Board.

Issued: June 7, 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