

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

K.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 12-32
Issued: October 9, 2012**

Appearances:
Coby Jones, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2011 appellant, through her representative, filed a timely appeal from the July 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and its September 29, 2011 nonmerit decision denying her request for reconsideration. 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

¹ 5 U.S.C. 8101 *et seq.*

² On appeal, appellant submitted additional evidence. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for wage-loss compensation for the period February 12 through March 31, 2011; and (2) whether it properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 21, 2011 appellant, a 63-year-old mail carrier, filed an occupational disease claim alleging that she sustained right shoulder tendinitis, right rotator cuff tear and subacromial impingement due to repetitive job activities. She stated that she worked full time until December 19, 2010, when she stopped working. Appellant reportedly returned to work on January 11, 2011 and worked two hours per day until January 14, 2011 when she stopped working altogether. Her claim was accepted for sprain of the upper arm and right rotator cuff.

Appellant filed claims for wage-loss compensation alleging that she was totally disabled due to her accepted conditions from February 12 through March 31, 2011.

In support of her wage-loss claim, appellant submitted a January 17, 2011 report from Dr. Andrew M. Giovanni, a Board-certified orthopedic surgeon, who described a history of gradual onset since 2005 of shoulder pain, which caused her to stop working on December 19, 2010. She reportedly returned to work on January 17, 2011, but was unable to continue working due to right shoulder pain after only two hours. On examination of the right shoulder, appellant had localized tenderness at the subacromial region and over the right joint. There was mild crepitation with abduction and forward flexion. Adduction was limited to 130 degrees with pain. Internal rotation was restricted. Measurements of grip strength taken with a Jamar Dynamometer reflected a 33 percent loss of normal grip strength. Appellant had grade 4 motor function of the deltoid and rotator cuff. Neer's impingement test was positive. Cervical spine motion was restricted by 50 percent in all directions with moderate degree paravertebral muscle spasm, worse on the right side. Dr. Giovanni provided a tentative diagnosis of right shoulder tendinitis, rotator cuff tear and subacromial impingement, as well as cervical degenerative joint disease, pending the results of x-rays and magnetic resonance imaging (MRI) scans. He opined that appellant was totally disabled from work as of January 17, 2011 and could tentatively return to work on March 30, 2011. Dr. Giovanni also indicated that his findings and diagnosis were consistent with her account of the injury.

The record contains a report of an August 18, 2010 MRI scan of the right shoulder, which revealed high-grade partial anterior bursal-sided supraspinatus tendon tear at footprint with mild supraspinatus muscle atrophy; infraspinatus tendon mucoid degeneration; superimposed partial tear not fully excluded; distal intra-articular biceps tendinosis; moderate subacromial, subdeltoid and subcoracoid bursal fluid; and moderate acromioclavicular (AC) joint arthropathy.

Appellant submitted reports for the period April 29 to September 16, 2010 from Dr. Anthony Luke, Board-certified in family medicine. On April 29, 2010 Dr. Luke diagnosed right shoulder rotator cuff tendonopathy, most likely with an underlying rotator cuff tear. On August 5, 2010 he provided examination findings reflecting reduced flexion and positive Neers and Hawkins impingement signs on the right. On September 16, 2010 Dr. Luke diagnosed right

rotator cuff high-grade partial tear and impingement from lateral acromion, based on imaging results.

Appellant submitted a January 19, 2011 report from Dr. Laura Hill-Sakurai, Board-certified in family medicine, who diagnosed right rotator cuff high-grade partial tear and impingement from the lateral acromion. Dr. Hill-Sakurai described appellant's repetitive job duties, including extensive lifting, reaching and carrying of heavy packages and bags. Based on Dr. Luke's examination findings, Dr. Hill-Sakurai stated that it was "highly likely that [appellant's] work-related activities of extensive lifting, reaching and carrying (over the past 23 years she has served as a USPS mail carrier) are the cause of her chronic shoulder injury, as well as the cause of the recent aggravation of this injury."

In a March 8, 2011 report, Dr. A. Shabi Khan, a Board-certified internist, who diagnosed high-grade partial essentially near complete tear along the right bursal-sided margin and leading into the supraspinatus with mucoid degeneration in the infraspinatus and AC joint changes. Examination of the right shoulder revealed tenderness along the anterior aspect of the acromion and laterally. There was very mild tenderness over the AC joint. There was positive impingement sign to internal rotation and deficit of strength to forward flexion, abduction and caption. O'Brien's test was positive, with pain upon compression/rotation and mild bicipital tendinitis. Dr. Khan recommended right rotator cuff repair.

By letter dated March 18, 2011, OWCP informed appellant that the information submitted was insufficient to establish her claim and advised her to submit contemporaneous medical evidence of the disability for the period claimed, supported by an increase in objective findings and an explanation as to how this increase precluded her from performing her employment duties. It provided her 30 days to submit the required evidence.

In a March 21, 2011 statement, appellant indicated that she used sick leave for workdays missed due to her accepted shoulder injury from December 20, 2010 through January 11, 2011, when she returned to work. She worked two hours per day from January 11 through 16, 2011. From January 17 and February 11, 2011, appellant used sick and annual leave.

Appellant submitted hospital records, nursing notes and reports from Dr. Khan for the period March 24 through June 6, 2011 reflecting that she underwent right shoulder arthroscopy, subacromial decompression and full thickness rotator cuff repair on April 1, 2011. In a letter dated March 31, 2011, Dr. Khan stated that appellant had requested "simple documentation with respect to her ongoing right shoulder secondary to her full-thickness rotator cuff repair as well as her significant bone spur." He indicated that appellant had been having intermittent pain since 2005, which had since become constant. Dr. Khan noted that she had apparently been off from work since December 20, 2010 with temporary total disability. Appellant worked two hours a day from January 11 to 15, 2011 but was unfortunately unable to maintain that work status, secondary to continued discomfort. On June 2, 2011 Dr. Khan released her to return to work with modified duties, which included no repetitive motion.

In a letter dated July 9, 2011, appellant reiterated her request for compensation for the period February 12 through March 31, 2011. She contended that reports dated January 17 and

March 31, 2011 from Drs. Giovanni and Khan respectively established her disability from work during that period.

In a decision dated July 18, 2011, OWCP denied appellant's claim for compensation for the period February 12 through March 31, 2011, finding that the evidence did not establish that she was disabled during the claimed period as a result of her accepted injury.

On July 18, 2011 appellant requested reconsideration. In support of her request, she submitted a July 18, 2011 letter from Dr. Khan, who stated:

“[Appellant] comes in for a follow up of her right shoulder. She is here for simple documentation with respect to her time off from work. [Appellant] has been having intermittent pain since 2005 and now, it has been constant. She has been apparently off from work from December 20, 2010 until this point with temporary total disability. [Appellant] was previously working two hours a day from January 11 to 15, 2011. Unfortunately, secondary to continued discomfort, she was unable to maintain this work status.

“Once again, this is a simple documentation with respect to her ongoing right shoulder secondary to her full-thickness rotator cuff repair as well as her significant bone spur.”

Appellant also submitted reports from Dr. Khan dated August 8, 2011 reflecting that she was able to work with restrictions, nursing notes and copies of previously submitted letters and reports from her physicians.

In a letter dated August 1, 2011, Dr. Katherine K. Strelkoff, Board-certified in family medicine, stated that appellant was unable to work from January 17 through March 31, 2011 due to a rotator cuff tear and shoulder impingement. She indicated that appellant had attempted to return to work in early January 2011 but was unable to perform work-related activities due to pain and limited range of motion at her shoulder. Appellant's MRI scan from August 2010 reportedly showed a high-grade partial tear of the supraspinatus tendon and impingement from the acromion due to ossification at the coracoacromial ligament. She subsequently had a surgical repair in April 2011.

By decision dated September 29, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the evidence.³ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of

³ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

the accepted employment injury.⁴ Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁵ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify her disability and entitlement to compensation.⁶

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁷ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁸

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁹ Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹⁰

ANALYSIS -- ISSUE 1

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her claimed total disability for the period February 12 and March 31, 2011 and the accepted sprain of the upper arm and right rotator cuff.¹¹ The reports of her physicians do not provide a rationalized medical opinion finding her disabled for work for the claimed period due to her accepted condition. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof.

In his January 17, 2011 report, Dr. Giovanni provided examination findings and a tentative diagnosis of right shoulder tendinitis, rotator cuff tear and subacromial impingement, as well as cervical degenerative joint disease, pending the results of x-rays and MRI scans. He opined that appellant was totally disabled from work as of January 17, 2011 and could tentatively

⁴ See *Amelia S. Jefferson, id.* See also *David H. Goss*, 32 ECAB 24 (1980).

⁵ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁶ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ See *Viola Stanko (Charles Stanko)*, 56 ECAB 436 (2005); see also *Naomi A. Lilly*, 10 ECAB 560, 572-573 (1959).

⁸ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

⁹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁰ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

¹¹ See *supra* note 4.

return to work on March 30, 2011. Dr. Giovanni's report is deficient on several counts. It does not contain a definitive diagnosis or an opinion as to how her alleged disability was causally related to her accepted injury.¹² It also fails to discuss appellant's employment duties or how her current physical condition rendered her unable to perform those duties. An exacerbation of her symptoms does not automatically result in her inability to work.¹³ For all of these reasons, Dr. Giovanni's report is of limited probative value.

On January 19, 2011 Dr. Hill-Sakurai diagnosed right rotator cuff high-grade partial tear and impingement from the lateral acromion. Based on Dr. Luke's examination findings, she stated that it was "highly likely that appellant's work-related activities of extensive lifting, reaching and carrying (over the past 23 years she has served as a USPS mail carrier) are the cause of her chronic shoulder injury, as well as the cause of the recent aggravation of this injury." Dr. Hill-Sakurai's opinion is insufficient to establish appellant's claim for disability. The report does not reflect that she examined appellant. Rather, Dr. Hill-Sakurai's opinion is based upon examination findings provided by Dr. Luke. Moreover, her speculative opinion that appellant's employment duties caused her shoulder condition does not address the issue at hand, namely whether appellant was disabled during the claimed period due to the accepted condition. Therefore, the report is of limited probative value.

Dr. Kahn's reports also fail to establish that appellant was disabled for the period in question. On March 8, 2011 he diagnosed high-grade partial essentially near complete tear along the right bursal-sided margin and leading into the supraspinatus with mucoid degeneration in the infraspinatus and AC joint changes. Dr. Kahn provided examination findings and recommended right rotator cuff repair. As he did not offer an opinion that appellant was disabled during the claimed period due to her accepted injury, his report lacks probative value.

On March 31, 2011 Dr. Khan stated that appellant had requested "simple documentation with respect to her ongoing right shoulder secondary to her full-thickness rotator cuff repair as well as her significant bone spur." He indicated that she had been having intermittent pain since 2005, which had since become constant. Dr. Kahn noted that appellant had apparently been off from work since December 20, 2010 with temporary total disability. Appellant worked two hours a day from January 11 to 15, 2011 but was unfortunately unable to maintain that work status, secondary to continued discomfort. Dr. Kahn, however, provided no objective findings to support her disability nor did he address how her flare-up prevented her from performing the duties associated with her job. Moreover, he failed to explain how appellant's alleged disability was causally related to the accepted injury.¹⁴ For all of these reasons, Dr. Kahn's report is of diminished probative value. Disability slips, reports and notes from him that do not contain an opinion regarding appellant's disability due to her accepted condition during the claimed period are irrelevant and, therefore, do not constitute probative medical evidence.

¹² *Willa M. Frazier*, 55 ECAB 379 (2004); *see also David L. Scott*, 55 ECAB 330 (2004); *see Brenda L. DuBuque*, 55 ECAB 212 (2004).

¹³ *See Cheryl L. Decavitch*, *supra* note 10.

¹⁴ *See Brenda L. DuBuque*, *supra* note 12; *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Dr. Luke provided examination findings and diagnosed right rotator cuff high-grade partial tear and impingement from lateral acromion, based on imaging results. He did not, however, provide an opinion on the cause of appellant's condition or the issue of disability. Therefore, Dr. Luke's reports are of limited probative value.

The remaining medical evidence of record, which includes disability slips, test results, nursing notes and reports not containing an opinion on the issue of appellant's work-related disability, is insufficient to establish her claim. Because appellant has not submitted any reasoned medical opinion evidence to show that she was disabled for the period February 12 through March 31, 2011 as a result of her accepted employment injury, the Board finds that OWCP properly denied her claim for wage-loss compensation.

On appeal, appellant contends that the medical evidence is sufficient to establish her claim for disability during the claimed period. For reasons stated, the Board finds that the evidence is not sufficient to establish her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹⁵

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered; or (3) constitutes relevant and pertinent new evidence not previously considered.¹⁶

A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.¹⁷ Where the request is timely but fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁸

¹⁵ 20 C.F.R. § 10.605.

¹⁶ *Id.* at § 10.606.

¹⁷ *Donna L. Shahin*, 55 ECAB 192 (2003).

¹⁸ 20 C.F.R. § 10.608.

ANALYSIS -- ISSUE 2

Appellant's June 6, 2006 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Dr. Kahn's July 18, 2011 letter reiterated statements made in his letter of March 31, 2011 and is, therefore, cumulative and duplicative in nature.¹⁹ Likewise, Dr. Strelkoff's letter dated August 1, 2011 essentially repeated information contained in documents previously received and reviewed by OWCP and is, therefore, cumulative.²⁰ The Board finds that this report does not constitute relevant and pertinent new evidence not previously considered by OWCP.²¹ Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Reports from Dr. Khan dated August 8, 2011 reflecting that appellant was able to work with restrictions and nursing notes, neither of which address the issue of disability during the claimed period, are irrelevant and therefore insufficient to warrant merit review. Copies of previously submitted letters and reports from appellant's physicians are duplicative and do not constitute relevant and pertinent new evidence not previously considered by OWCP.²²

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her request for reconsideration.

On appeal, appellant contends that the evidence submitted is sufficient to warrant merit review. As noted, the Board finds that OWCP properly denied her request for further merit review.

CONCLUSION

The Board finds that appellant has not established that she was disabled for work and entitled to wage-loss compensation for the periods February 12 through March 31, 2011. The Board further finds that OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

²⁰ *Id.*

²¹ *See Susan A. Filkins*, 57 ECAB 630 (2006).

²² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and July 18, 2011 are affirmed.

Issued: October 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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