

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

A.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Detroit, MI, Employer)

**Docket No. 12-708
Issued: October 3, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 28, 2012 appellant filed a timely appeal from two merit decisions of the Office of Workers' Compensation Programs (OWCP) dated December 16, 2011 denying her claims for recurrence of disability. 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability for the periods February 23 to June 3, 2011 and July 22 to December 16, 2011 causally related to her accepted injury.

On appeal, appellant contends that she was entitled to compensation for time lost due to the employing establishment's withdrawal of her limited-duty position.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a February 3, 2012 decision, the Board affirmed OWCP's December 20, 2010 decision denying appellant's claim for a recurrence of total disability for the period June 28 through December 20, 2010.² In a July 10, 2012 decision, the Board affirmed May 3 and September 22, 2010 decisions denying her recurrence claim for the period December 21, 2010 through February 22, 2011.³ The facts and the law contained in those decisions are incorporated herein by reference. The relevant facts are delineated below.

OWCP accepted appellant's April 30, 2002 occupational disease claim for left shoulder tendinitis and left cubital tunnel syndrome.⁴ Appellant returned to modified duty on August 20, 2007. By decision dated March 9, 2010, OWCP accepted her recurrence claim for the period October 22, 2008 through March 7, 2010. By decision dated May 19, 2010, it denied appellant's recurrence claim for the period March 27 through June 27, 2010 on the grounds that the record did not contain medical evidence establishing that she was disabled during the claimed period.

On December 4, 2010 appellant's treating physician, Dr. Tariq M. Awan, Board-certified in family medicine, released appellant to work full time with restrictions, including no repetitive or overhead work and no lifting above the shoulder. On that same date, appellant accepted a full-time position as a modified mail handler, which required her to day-tag parcels as they came off trailers and to walk areas to ensure that parcels were tagged. Appellant worked only one day in the light-duty job.

On January 13, 2011 the employing establishment notified appellant of its intent to terminate her for failure to report to work after working for one day on December 4, 2010 or to provide evidence to support her claim that she was unable to work after that date. Appellant was considered to be absent without leave (AWOL) and was placed on administrative leave without pay. The record reflects that she was terminated effective February 25, 2011 for failing to report to work as assigned from December 5 through 23, 2010 and failing to provide any medical documentation of her inability to work.⁵

By decision dated December 20, 2010, OWCP denied appellant's claim for compensation for the period June 28 through December 20, 2010 on the grounds that the medical evidence of record failed to establish that she was disabled for work during that period due to the accepted

² Docket No. 11-1350 (issued February 3, 2012).

³ Docket No. 12-57 (issued July 10, 2012). The Board also set aside an August 18, 2011 decision denying merit review and remanded the case for a merit review of a May 19, 2010 decision denying a recurrence claim for the period March 27 through June 27, 2010.

⁴ Appellant's April 23, 2002 claim was accepted for contusions of the chest and left arm, elbow and shoulder in File No. xxxxxx836. File No. xxxxxx836 was combined with the instant case (File No. xxxxxx142), with File No. xxxxxx142 serving as the master file.

⁵ Appellant grieved her potential firing from the employing establishment. She was permitted to return to limited duty in June 2011.

work injury. By decision dated February 3, 2012, the Board affirmed the December 20, 2010 decision denying appellant's recurrence claim.

By decisions dated May 3 and September 22, 2011, OWCP denied appellant's compensation claim for disability for the period December 21, 2010 through February 22, 2011. In its July 10, 2012 decision, the Board affirmed those OWCP decisions, finding that appellant had abandoned her light-duty position after December 4, 2010 and failed to establish that her light-duty position was improperly withdrawn.

Appellant filed a grievance against the employing establishment. The record does not contain documents relating to the filing or disposition of the grievance. The employing establishment stated, however, that appellant was allowed to return to her modified position without back pay on June 4, 2011 under a "Last Chance Agreement," with no admission of fault on the part of the employing establishment. After working four days, appellant missed work intermittently until July 22, 2011, when she stopped work altogether.

Appellant filed claims for compensation for the period February 23 through June 3, 2011. On September 20, 2011 OWCP informed her that her claims for compensation were not compensable if they were merely a continuation of her forced administrative leave pursuant to her prior leave-without-pay status. It advised appellant to submit a Form CA-2a (recurrence of disability) with supporting medical evidence, if she was claiming a medical disability.

Appellant submitted disability slips from Dr. Awan and Dr. Ateeq K. Rehman, a Board-certified physiatrist, dated March 19 through August 11, 2011. Dr. Awan provided examination findings and diagnoses pertaining to appellant's left elbow, left shoulder and back. On June 11, 2011 he provided findings that revealed appellant's condition was unchanged and indicated that she was working full time with restrictions. On July 9, 2011 Dr. Rehman noted complaints of left arm pain, provided findings on examination and noted that appellant was working with restrictions. None of the reports contained an opinion regarding appellant's ability to work from February 23 through June 3, 2011.

Appellant filed claims for total disability for the period July 22 through September 22, 2011. In a letter dated October 24, 2011, OWCP informed her that her prior claim for disability for the period February 23 through June 4, 2011 had been denied because she failed to show up for work or to provide medical evidence of her disability. It advised appellant to submit evidence that she contended constituted error on the part of the employing establishment or medical evidence establishing her disability for the current claimed period.

In a July 29, 2011 report, Dr. Rehman provided examination findings and diagnosed left rotator cuff tendinitis; left wrist complex regional pain syndrome; right S1 dysfunction and left cubital tunnel syndrome. He noted that appellant was not working. Dr. Reyman did not, however, provide an opinion as to the cause of her diagnosed conditions or as to whether she was capable of working at that time. On August 10, 2011 he stated that appellant had returned to work on the previous Monday, but had not returned since due to a flare up of arm pain.

In an August 8, 2011 disability note, Dr. Awan stated that appellant was unable to work from July 22 through 29, 2011. He indicated that she could return to work on July 30, 2011.

Appellant submitted an August 3, 2011 report from Dr. Mohammad Yusaf, a Board-certified pediatrician, reflecting that she was seen in a hospital emergency room on that date for an acute exacerbation of chronic left shoulder and arm pain. A form report from the Henry Ford Wyandotte Hospital indicated that she was seen in the emergency department on August 19, 2011. Robert McIntee, a nurse practitioner, stated that appellant was told not to work until released by her family physician. Triage notes dated August 19, 2011, signed by Dr. Gale Darnell, Board-certified in emergency medicine, reflect that appellant was seen in the emergency room on that date for left shoulder and arm pain.

In a November 22, 2011 report, Dr. Harprest Sagar, a treating physician, diagnosed rotator cuff tendinopathy and a chronic problem secondary to previous trauma. Examination reflected left shoulder tenderness and limited range of motion. Dr. Sagar noted that appellant's pain was adequately controlled, but did not opine as to whether she was disabled from her light-duty job.

By decision dated December 16, 2011, OWCP denied appellant's claim for compensation beginning from February 23 through June 3, 2011. The claims examiner found that the period claimed was a continuation of the administrative leave forced upon her when she attempted to return to work on December 4, 2010. He further found that appellant had shown no employing establishment error and had not submitted sufficient medical evidence to establish disability during the claimed period.

In a separate decision dated December 16, 2011, OWCP denied appellant's claim for compensation for the period July 22 through December 16, 2011 on the grounds that the medical evidence was insufficient to establish that she was disabled from performing the duties of her modified position during the period in question.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations define "recurrence of disability" as 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.⁶ 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, (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.⁷

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 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

⁶ 20 C.F.R. § 10.5(x) (2002). See *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁷ *Id.*

disability, and show that he or 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.⁸

The Board will not require OWCP 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.⁹

ANALYSIS

For the period February 23 through June 3, 2011, OWCP denied appellant's compensation claim finding that the evidence failed to establish that she was disabled due to her accepted injury during that period. Further, the period claimed was a proper continuation of the administrative leave forced upon her due to her AWOL status. It denied her claim for compensation for the period July 22 through December 16, 2011 on the grounds that the medical evidence was insufficient to establish that she was disabled from performing the duties of her modified position during the period in question. The Board finds that OWCP properly denied appellant's claims for compensation for the periods February 23 through June 3, 2011 and July 22 through December 16, 2011. The Board will affirm the December 16, 2011 decisions.

In its July 10, 2012 decision, the Board affirmed the denial of appellant's compensation claim for the period December 21, 2010 through February 22, 2011. The Board found that the employing establishment had provided her with a modified position that was within her medical restrictions, that she abandoned the position on December 4, 2010 without providing sufficient medical evidence, that she was disabled from performing the duties of the position and that she failed to establish that her light-duty position was improperly withdrawn. The findings of the Board in its July 10, 2012 decision remain the law of this case. As it was established that the modified position was within appellant's restrictions and that it was not improperly withdrawn, appellant had the burden to establish that she was disabled from performing the duties of the position during the claimed period.¹⁰

The Board finds that appellant has not established that she was disabled from work in a modified position from February 23 through June 3, 2011 due to her accepted condition. On December 4, 2010 Dr. Awan released her to work full time with restrictions, including no repetitive or overhead work and no lifting above the shoulder. On that same date, appellant accepted a modified mail handler position, which complied with her restrictions. The medical evidence of record relevant to the claimed period consists of reports dated February 12 and March 19, 2011 from Dr. Awan, who provided examination findings and diagnoses pertaining to

⁸ *Conard Hightower*, 54 ECAB 796 (2003).

⁹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ The Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director. Otherwise there could be no finality of decisions, the whole appeals procedure would be nullified and questions would remain moot. *Anthony Greco*, 3 ECAB 84, 85 (1949).

her left elbow, left shoulder and back and noted that she was off work due to her restrictions. Dr. Awan did not, however, provide an opinion as to whether appellant's condition had worsened or whether she was disabled during the claimed period due to her accepted injury. He did not explain how her diagnosed condition prevented her from performing the duties of her modified position. Dr. Awan's reports therefore are of diminished probative value and are insufficient to establish appellant's claim.

The medical evidence of record is also insufficient to establish that appellant was disabled from July 22 through December 16, 2011. On June 11, 2011 Dr. Awan provided findings that revealed her condition was unchanged and indicated that she was working full time with restrictions. In an August 8, 2011 disability note, he stated that appellant was unable to work from July 22 through 29, 2011. Dr. Awan's cryptic note did not contain examination findings, a definitive diagnosis or an explanation as to how her claimed disability was causally related to her accepted condition. Therefore, it is of limited probative value.

In a July 29, 2011 report, Dr. Rehman provided examination findings and diagnosed left rotator cuff tendinitis, left wrist complex regional pain syndrome, right S1 dysfunction and left cubital tunnel syndrome. He noted that appellant was not working. Dr. Rehman did not, however, provide an opinion as to the cause of appellant's diagnosed conditions or as to whether she was capable of working at that time. On August 10, 2011 he stated that appellant had returned to work on the previous Monday, but had not returned since due to a flare up of arm pain. Dr. Rehman did not explain how the flare up of appellant's arm pain was causally related to her accepted injury. A medical opinion that is not fortified by rationale is of diminished probative value. Dr. Rehman did not address how appellant's condition had worsened to the degree that she was no longer able to perform the duties of her modified position during the claimed period. As noted, the Board will not require OWCP to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought.¹¹

On November 22, 2011 Dr. Sagar diagnosed rotator cuff tendinopathy and a chronic problem secondary to previous trauma. He provided examination findings and noted that appellant's pain was adequately controlled. Dr. Sagar's report does not, however, contain an opinion as to whether appellant was disabled from her light-duty job. Therefore, his report is of diminished probative value.

The record contains an August 19, 2011 report from a nurse practitioner. As nurse practitioners are not considered to be physicians under FECA, this report does not constitute probative medical evidence.¹²

¹¹ *Fereidoon Kharabi, supra* note 9.

¹² A medical report may not be considered to be probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined by FECA. Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

The remaining medical evidence of record, including emergency room records, x-ray and magnetic resonance imaging scan reports, disability slips and prescription notes, do not provide any opinion on the cause of appellant's condition or on the issue of her disability. These reports are of limited probative value and are insufficient to establish appellant's recurrence claim.

On appeal, appellant contends that she was entitled to compensation for time lost due to the employing establishment's withdrawal of her limited-duty position. She can establish a recurrence of disability by establishing that her light-duty assignment was withdrawn for reasons other than misconduct, nonperformance of job duties or a reduction-in-force.¹³ As noted, appellant has not established such a withdrawal. The Board has found that she failed to establish that her light-duty position was improperly withdrawn.

Appellant failed to establish by the weight of the reliable, probative and substantial evidence, a change in the nature and extent of the injury-related condition resulting in her inability to perform the duties of her modified employment. She provided insufficient rationalized opinion evidence establishing that she was disabled from February 23 to June 3, 2011 or from July 22 to December 16, 2011, or any evidence that the employing establishment withdrew, or was unable to provide her with, a light-duty job within her medical restrictions. As appellant has not submitted sufficient medical evidence to establish that she sustained a recurrence of disability due to her accepted employment injury, the Board finds that she has not met her burden of proof.

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.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability that was causally related to her accepted injury from February 23 to June 3, 2011 and from July 22 to December 16, 2011.

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 3, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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