

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

C.J., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION ALAMEDA, Alameda, CA, Employer**

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**Docket No. 13-1868
Issued: April 14, 2014**

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2013 appellant, through his representative, filed an appeal from a May 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 his burden of proof to establish employment-related disability from March 25, 2005 to August 19, 2010 due to the accepted right shoulder and low back injuries.

On appeal, appellant's representative asserts that the medical evidence, including that appellant needed additional right shoulder surgery in 2009, establishes that he is disabled for work.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board.² In an April 3, 1998 decision, the Board reversed a September 14, 1994 decision in which OWCP reduced appellant's compensation based on his ability to earn wages in the selected position of security guard because he had not been given proper notice.³ In a December 14, 2005 decision, the Board affirmed a May 2, 2004 OWCP decision, finding that it properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).⁴ In a January 3, 2012 decision, the Board found that, as appellant's request for reconsideration was untimely filed and he failed to establish clear evidence of error, OWCP properly denied a merit review of his claim by its December 9, 2010 decision.⁵ The law and facts of the previous Board decisions are incorporated herein by reference.

On August 19, 2010 appellant filed a Form CA-7 claim for compensation for the period March 25, 2005 to present. The employing establishment indicated that he had retired in December 1979.

The medical evidence includes an April 20, 1982 computerized tomography scan of the lumbosacral spine that demonstrated slight bulging of the L3-4 interspace without evidence of herniation and normal appearance of interspaces from L4 to S1 without evidence of bulge or herniation. A November 12, 2001 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated a posterior disc bulge at L3-4 that could be impinging on the left transiting L4 nerve root and mild degenerative changes and multiple other lumbar levels.

² On September 13, 1978 appellant, an aircraft mechanic helper, sustained an employment-related right acromioclavicular shoulder separation that required surgery. On March 8, 1979 he aggravated the 1978 shoulder injury and had a lumbar strain while lifting engine mounts at work. Appellant stopped work on March 15, 1979 and did not return to federal employment. On October 17, 1979 Dr. David Wren, an attending orthopedic surgeon, performed an open reduction and reconstruction of the right acromioclavicular joint with stabilization of the right scapula. He was placed on the periodic compensation rolls. In late 1979, appellant was involved in an altercation with Richmond, California police and reinjured his right shoulder, for which he had additional surgery. He sued the city and received a monetary settlement. On February 6, 1984 appellant was granted a schedule award for 27 percent impairment of the right arm. He was referred to vocational rehabilitation in 1986 and training was authorized. Appellant did not complete the training and worked at various outside positions including: automobile mechanic, a heavy equipment operator and a longshoreman. In 1992, he elected retirement benefits from the Office of Personnel Management, effective June 29, 1992. Dr. Wren performed a second right shoulder procedure on November 15, 1995. He has a service-connected back injury and indicated on January 4, 2011 that he was receiving Veterans Affairs (VA) benefits for this condition. Appellant also has a nonemployment-related left shoulder injury that required surgery.

³ 49 ECAB 440 (1998). By decision dated February 28, 2002, OWCP denied appellant's November 29, 2001 claim that he sustained a recurrence of disability. In a December 26, 2002 decision, OWCP's hearing representative found that appellant did not establish that he had an employment-related emotional condition, diabetes or high blood pressure and remanded the case to OWCP for further development regarding his low back condition. Based on the April 8, 2003 opinion of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, on May 8, 2003, OWCP found that appellant failed to establish a recurrence of disability due to a low back condition. On May 2, 2004 it denied his reconsideration request.

⁴ Docket No. 05-1169 (issued December 14, 2005).

⁵ Docket No. 11-1221 (issued January 3, 2012).

Dr. D. Wren and his associate Dr. Alisha Wren, Board-certified in emergency medicine, submitted numerous form reports. In a March 17, 2005 report, Dr. D. Wren noted that appellant complained of constant right shoulder and back pain radiating down the left leg. Objective findings included reduced right shoulder motion and abnormal MRI scan study findings in November 2001. Dr. D. Wren diagnosed shoulder bursitis-tendinitis, shoulder adhesive capsulitis and lumbar disc disease. He advised that appellant could return to full duty on the water front. On June 6, 2005 Dr. A. Wren indicated that appellant had not worked since March 25, 2005. On September 12, 2005 Dr. D. Wren reported lower back and leg pain and again noted the MRI scan study findings. He stated that appellant was disabled from his previous job and needed low back surgery. In reports dated December 5, 2005 and February 28, 2006, Dr. D. Wren noted that appellant complained of back and shoulder pain, reiterated his diagnoses and indicated that he was disabled from his previous aircraft mechanic job.

In reports beginning June 26, 2006, Dr. D. Wren reported that appellant was seen for a painful right shoulder and described findings of reduced shoulder motion and strength. He advised that appellant could perform no overhead work repeatedly with the right arm and no heavy lifting. Dr. D. Wren requested authorization for additional right shoulder surgery.⁶ On March 26, 2007 he indicated that appellant was disabled from work and on May 14, 2007 advised that he could return to modified duty on May 14, 2007 with no heavy work. Dr. D. Wren continued to submit reports describing right shoulder pain and advised that appellant could return to his old job and could not perform heavy work. In a January 16, 2009 report, he described his treatment for appellant's right shoulder beginning in 1979. Dr. D. Wren stated that reconstructive wires had broken and appellant needed additional surgery to explore the shoulder and remove the broken wires. He further indicated that appellant had residual arthritic changes in the acromioclavicular joint. Dr. D. Wren continued to submit reports describing appellant's right shoulder condition and diagnoses, indicating that he was disabled.

The right shoulder surgery was authorized by OWCP in May 2009. On July 1, 2009 Dr. D. Wren performed a third surgical procedure on appellant's right shoulder. Discharge diagnoses included retained metallic implants causing right shoulder pain; shoulder arthritis, synovitis, bursitis; and complete tear of the rotator cuff, all components and glenoid labrum. On July 13, 2009 Dr. D. Wren reported that appellant had much less right shoulder pain. He advised that appellant should remain off work until October 1, 2009. In work capacity evaluations dated July 30 and August 21, 2009, Dr. A. Wren indicated that appellant was recovering from shoulder surgery and could not work for several months. On September 10, 2009 she noted right shoulder pain and weakness. Dr. A. Wren advised that appellant should remain off work until November 1, 2009. A September 10, 2009 right shoulder x-ray showed seven metallic staples and acromioclavicular joint separation. On October 15, 2009 Dr. D. Wren reported appellant's complaint of constant right shoulder pain with reduced range of motion and marked crepitus. He advised that appellant should remain off work until December 1, 2009.

⁶ On April 20, 2007 appellant filed a recurrence claim, indicating that he sustained a recurrence of disability on March 23, 2005. He did not submit the claim through the employing establishment. In letters dated May 18 and June 4, 2007, OWCP informed appellant of the evidence needed. The record contains no follow-up of the recurrence claim after that date.

In October 2009, OWCP referred appellant to Dr. Joel W. Renbaum, Board-certified in orthopedic surgery, for a second opinion evaluation. In a November 19, 2009 report, Dr. Renbaum reported the history of injury and subsequent medical history as related by appellant, his review of the medical record and appellant's complaint of right shoulder and low back pain radiating into the left foot. He noted that appellant had three right shoulder procedures in 1979, 1995 and 2009, left shoulder surgery in 1998 from an injury that occurred in private employment and low back surgery in 2007. Right shoulder examination demonstrated winging of the right scapula, tenderness to palpation over the anterior and posterior capsule and decreased shoulder range of motion. Impingement was positive bilaterally. There was tenderness to palpation over the lower lumbar musculature from L4-S1 with mild bilateral sciatic tract irritation. Sensory and motor examinations were normal. Dr. Renbaum stated that, based on information provided regarding appellant's right shoulder and lumbar spine, there were no preexisting or nonindustrial conditions that predated the 1978 and 1979 work injuries. He advised that appellant's right shoulder and low back conditions were directly caused by work injuries and recommended conservative treatment. Dr. Renbaum estimated that appellant would reach maximum medical improvement in April 2010, nine months following his most recent right shoulder surgery, at which time it would be appropriate to discuss physical limitations.

On November 30, 2009 Dr. D. Wren reiterated appellant's right shoulder complaints. He indicated that appellant could return to limited duty as far as his shoulder was concerned but that his lower back/leg issues precluded him from working.

In a supplemental report dated December 14, 2009, Dr. Renbaum reiterated that appellant had not reached maximum medical improvement after the July 2009 shoulder surgery. He indicated that appellant would be capable of performing work with very limited use of the left upper extremity for reaching, pushing, pulling or lifting a maximum of three pounds with the "left" upper extremity and could not reach above shoulder height.

In reports dated December 29, 2009 to November 11, 2010, Dr. D. Wren described appellant's complaint of worsening constant right shoulder pain with crepitus, muscle tightness and weakness and reduced range of motion. He advised that appellant could perform no heavy work or lifting above the shoulder with the right upper extremity. A December 8, 2010 right shoulder x-ray demonstrated degenerative and postsurgical changes with no acute fracture or dislocation. In a work capacity evaluation dated January 5, 2011, Dr. D. Wren advised that appellant could not perform his usual job for eight hours a day due to chronic pain in the right shoulder, lower back and legs. He advised that appellant had reached maximum medical improvement and provided permanent work restrictions. Dr. D. Wren additionally diagnosed severe lumbar myelopathy due to lumbar disc disorder, spinal stenosis and peripheral neuropathy. He continued to submit reports describing appellant's right shoulder and lower back condition.

By letter dated March 30, 2012, OWCP informed appellant of the evidence needed to support his disability claim. In correspondence dated May 15, 2012, appellant indicated that he was not seeking compensation prior to his July 2009 right shoulder surgery. This was reiterated by his representative in a May 25, 2012 letter. A June 4, 2012 right shoulder x-ray demonstrated no obvious acute osseous abnormality and a high-riding right humeral head, most consistent with

rotator cuff tear. Dr. D. Wren continued to submit reports describing appellant's right shoulder and lower back condition and diagnoses. He advised that appellant was disabled.

In a May 22, 2013 decision, OWCP found that appellant was not entitled to wage-loss compensation from March 25, 2005 to August 19, 2010 because the medical evidence was insufficient to establish that he was disabled due to a material change or worsening of the accepted conditions.

LEGAL PRECEDENT

Under FECA, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.⁸ The test of "disability" under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.⁹ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹ Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical 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 claimant.¹²

ANALYSIS

The Board finds this case is not in posture for decision. The accepted conditions for injuries that occurred in 1978 and 1979 are right shoulder acromioclavicular separation that required multiple surgeries and a low back strain. Appellant's last federal employment was in 1979 and he continued outside employment until 2005. He thereafter claimed disability

⁷ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁸ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁹ *Corlisa Sims*, 46 ECAB 963 (1995).

¹⁰ *Tammy L. Medley*, 55 ECAB 182 (2003).

¹¹ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

compensation. Appellant also has a service-related back condition for which he is receiving VA benefits, had back surgery in 2007¹³ and sustained a left shoulder injury while working in outside employment. In correspondence dated May 12 and 25, 2012, he and his representative indicated that appellant only claimed compensation due to July 2009 right shoulder surgery.

The medical evidence relevant to the period of claimed disability includes numerous reports from appellant's attending orthopedic surgeon, Dr. D. Wren. On January 16, 2009 Dr. D. Wren reported that he began treating appellant for his right shoulder injury in 1979 and that appellant needed additional surgery because reconstructive wires had broken and that he had developed residual arthritic changes in the acromioclavicular joint. He advised that appellant was totally disabled. On July 1, 2009 Dr. D. Wren performed a third surgical procedure on appellant's right shoulder. In subsequent reports, he indicated that appellant should remain off work due to constant right shoulder pain, reduced shoulder range of motion and marked crepitus. Dr. D. Wren also advised on November 30, 2009 that, while appellant could return to limited duty as far as his shoulder was concerned, he could not work due to lower back and leg issues and diagnosed severe lumbar myelopathy due to a lumbar disc disorder, spinal stenosis and peripheral neuropathy. He continued to submit reports describing appellant's right shoulder and low back conditions.

In the November 19, 2009 second opinion report, Dr. Renbaum noted appellant's report of the employment injuries and subsequent history and his complaints of right shoulder and low back pain radiating into the left foot. He indicated that appellant had right shoulder procedures in 1979, 1995 and 2009, left shoulder surgery in 1998 from an injury that occurred in private employment and low back surgery in 2007. Dr. Renbaum provided findings on physical examination and advised that appellant's right shoulder and low back conditions were directly caused by work injuries and recommended conservative treatment. He estimated that appellant would reach maximum medical improvement in April 2010, nine months following his most recent right shoulder surgery, at which time it would be appropriate to discuss physical limitations. In a December 14, 2009 supplemental report, Dr. Renbaum provided restrictions for appellant's left arm, not the accepted right.

The legal standard for establishing disability is not proof of "material change or worsening" of the accepted condition, as stated in OWCP's May 22, 2013 decision. Rather, as noted above, "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁴ In this case, at the time appellant was injured in 1978, he was an aircraft mechanic helper.¹⁵

The Board finds that the opinion of Dr. D. Wren, together with that of Dr. Renbaum, the OWCP referral physician, are probative regarding whether appellant was totally disabled beginning in 2009 due to the accepted right shoulder condition. Dr. Renbaum also indicated that

¹³ There is scant information in the record concerning this procedure.

¹⁴ See *supra* note 7.

¹⁵ The record before the Board contains a description of the physical requirements of the aircraft mechanic helper position, appellant's date-of-injury job. This indicates that it required heavy carrying of 45 pounds and over, pulling, pushing, reaching above the shoulder, crawling, repeated bending and climbing.

appellant's low back condition in 2009 was caused by the 1979 work injury, the accepted condition is a low back strain. He did not explain how or why the diagnosed lumbar degenerative disc disease was caused by the 1979 employment injury, especially in light of appellant's service-related back injury and years of outside employment after 1979, when he stopped federal employment. Nonetheless, Dr. Renbaum indicated that appellant would not reach maximum medical improvement for his right shoulder until approximately April 2010, at which time restrictions could be addressed. After receiving his December 14, 2009 supplemental report, OWCP did not seek clarification from him regarding the inconsistencies in his two reports regarding left and right arms or for permanent restrictions after appellant reached maximum medical improvement following the July 2009 right shoulder surgery. The Board also notes that the statement of accepted facts forwarded to Dr. Renbaum was not as complete as that prepared by OWCP on January 30, 2003.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ The case shall therefore be remanded to OWCP. On remand, OWCP shall prepare a new statement of accepted facts that delineates the 1978 and 1979 employment injuries, appellant's subsequent work history, any preexisting and subsequent injuries and refer appellant to Dr. Renbaum or a new examiner to provide a rationalized opinion as to whether appellant could no longer perform the duties of aircraft mechanic helper due to the accepted right shoulder acromioclavicular separation and low back strain. After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established that he was entitled to disability compensation.

¹⁶ See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: April 14, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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