

and right shoulder impingement due to pushing a cart at work. Appellant stated that the cart “jam[med] up” when she was pushing it and that she felt something pop in her right shoulder. She stopped work on January 30, 2008 but returned to limited-duty work for the employing establishment.² On April 24, 2008 Dr. Robert Kaneda, an attending osteopath and Board-certified orthopedic surgeon, performed arthroscopic surgery on appellant’s right shoulder, including repair of glenoid labral tear, subacromial decompression and acromioplasty. On September 25, 2008 he performed a repeat subacromial decompression and acromioplasty of her right shoulder. The procedures were authorized by OWCP. From the date of her first surgery, appellant received disability compensation on the daily rolls.

Effective September 4, 2009, appellant was terminated from the employing establishment for misconduct.³

On October 17, 2012 Dr. Matthew J. Kelly, an attending Board-certified orthopedic surgeon, performed right shoulder surgery, including arthroscopic rotator cuff debridement, subacromial decompression and acromioplasty.⁴ The procedure was authorized by OWCP.

In an October 26, 2012 report, Dr. Kelly discussed appellant’s progress since he performed surgery on her right shoulder on October 17, 2012. He advised that she had a minor amount of ecchymosis in her right arm and that her condition was progressing steadily. Dr. Kelly recommended that appellant start physical therapy that included pendulum exercises with the aim of weaning her from her right arm sling.

On November 5, 2012 appellant filed a claim for compensation (Form CA-7) for the period October 17 to 31, 2012. On November 14, 2012 she filed a Form CA-7 for the period November 1 to 15, 2012.⁵

In a letter dated November 14, 2012, OWCP advised appellant that a recurrence of disability was a work stoppage caused by withdrawal of a light-duty assignment made specifically to accommodate a claimant’s condition due to a work-related injury, but that the withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties.⁶ It noted that her October 17, 2012 surgery was authorized and that she remained entitled to medical care for treatment related to her January 30, 2008 injury, but that she was not entitled to monetary compensation for disability or a schedule award if her employment was terminated

² OWCP had denied appellant’s claim on May 13 and September 2, 2008, but she later submitted additional medical evidence supporting a January 30, 2008 work injury.

³ The Board notes that there is no evidence from the time of appellant’s September 4, 2009 work stoppage that it occurred due to a work-related medical condition.

⁴ Dr. Kelly had previously indicated that diagnostic testing from July 24, 2012 showed a high-grade partial or full-thickness tear of appellant’s right rotator cuff.

⁵ Appellant later filed a Form CA-7 for the period October 17, 2012 to January 18, 2013.

⁶ OWCP cited Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (May 1997). It also cited two cases of the Board: *Bruce Johnson*, Docket No. 00-145 (issued December 22, 2000) and *John W. Normand*, 39 ECAB 1378 (1988).

for cause. OWCP asked appellant if she had evidence that her termination on September 4, 2009 was not for cause and, if so, to submit such evidence together with a detailed statement addressing the circumstances of her termination.⁷

On February 1, 2013 Dr. Kelly noted that appellant was three and a half months post right shoulder surgery. Appellant reported that, after he released her to work, she began working for a private employing establishment but was later laid off from work. Dr. Kelly diagnosed “slow improving right shoulder status post arthroscopic rotator cuff debridement three and a half months ago.”⁸

In an April 23, 2013 decision, OWCP denied appellant’s claim for wage loss for the period October 17 to November 15, 2012. It noted that its procedure provides that a recurrence of disability is a work stoppage caused by withdrawal of a light-duty assignment made specifically to accommodate a claimant’s condition due to a work-related injury, but that the withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties.⁹ Appellant was advised that the surgery performed on October 17, 2102 was authorized and that she remained entitled to medical care for treatment related to her January 30, 2008 injury, but that she was not entitled to compensation for disability or a schedule award as her employment was terminated for cause. OWCP stated:

“To date the claimant has not provided evidence to support that the termination of her employment on September 4, 2009 was not for cause or in error on the part of her employing establishment. Therefore, as of this date, evidence is insufficient to support claimant’s entitlement to monetary benefits.”

On April 25, 2013 appellant spoke to an OWCP employee on the telephone and asserted that her September 4, 2009 termination was not for cause.

On May 13, 2013 appellant, through her representative, requested a hearing before an OWCP hearing representative.

In a January 16, 2014 decision, an OWCP hearing representative affirmed the April 23, 2013 decision denying appellant’s claim for compensation from October 17, 2012 to January 18, 2013. Regarding the reason for the denial of appellant’s claim, the hearing representative stated:

“FECA Procedural Manual notes that the definition of a recurrence of disability is a work stoppage caused by ‘withdrawal of a light[-]duty assignment made

⁷ OWCP stated, “While the surgery performed on October 17, 2012 was authorized by OWCP and you remain entitled to medical care for treatment related to your injury sustained on January 30, 2008, you are not entitled to compensation for disability or schedule award if your employment was terminated for cause.”

⁸ In a May 31, 2013 report, Dr. Kelly noted that appellant reported that she had returned to her full duties as a picker in a warehouse for a private employing establishment.

⁹ OWCP cited the same portion of its procedure manual that it cited in its November 14, 2012 letter. *See supra* note 6.

specifically to accommodate the claimant's condition due to the work-related injury. This withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties.'

"Although the [d]istrict [o]ffice authorized the claimant's November 2012 shoulder surgery and subsequent therapy, the payment of medical benefits does not constitute acceptance of a claim. Therefore, in the instant case, the authorization of shoulder surgery did not imply coverage for wage-loss benefits.

"The evidence of file demonstrates that the claimant stopped working on September 4, 2009, when she was terminated for cause; therefore, she has failed to establish a recurrence of disability due to withdrawal of a light-duty assignment. The claimant has no entitlement to compensation after September 4, 2009."¹⁰ (Citation omitted.)

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹¹ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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 Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues, which must be proved by a preponderance of reliable, probative and substantial medical evidence.¹³

In cases where employment has in fact been terminated for misconduct and disability is subsequently claimed, the Board has noted that in general the term "disability" under FECA means "incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury."¹⁴ Where employment is terminated for misconduct, disability benefits would be payable if the evidence of record established that the claimant was

¹⁰ OWCP's hearing representative indicated that appellant claimed that her September 4, 2009 termination was not for cause, but asserted that she did not submit evidence supporting this assertion.

¹¹ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

¹² *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹³ *W.D.*, Docket No. 09-658 (issued October 22, 2009).

¹⁴ *Ralph Dennis Flanagan*, Docket No. 94-1569 (issued May 28, 1996).

terminated due to injury-related physical inability to perform assigned duties or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.¹⁵

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

ANALYSIS

OWCP accepted that on January 30, 2008 appellant sustained sprains of her right shoulder and upper arm, right glenoid labral tear and right shoulder impingement due to pushing a cart at work. On April 24, 2008 Dr. Kaneda, an attending osteopath and Board-certified orthopedic surgeon, performed arthroscopic surgery on her right shoulder, including repair of glenoid labral tear, subacromial decompression and acromioplasty. On September 25, 2008 he performed a repeat subacromial decompression and acromioplasty of appellant's right shoulder. The procedures were authorized by OWCP and appellant received compensation for periods of disability. Effective September 4, 2009, appellant was terminated from the employing establishment for cause.

On October 17, 2012 Dr. Kelly, an attending Board-certified orthopedic surgeon, performed right shoulder surgery for arthroscopic rotator cuff debridement, subacromial decompression and acromioplasty.¹⁷ The procedure was authorized by OWCP. Appellant filed CA-7 forms for monetary compensation for the period October 17, 2012 to January 18, 2013. OWCP denied her claim for work-related disability in decisions dated April 23, 2013 and January 16, 2014.

The Board finds that this case is not in posture for decision regarding whether appellant met her burden of proof to establish that she had disability due to her January 30, 2008 work injury for the period October 17, 2012 to January 18, 2013. In connection with its denial of appellant's claim, OWCP failed to adequately consider the medical evidence submitted by her in support of her claim. In a November 14, 2012 informational letter and its April 23, 2013 and January 16, 2014 decisions, it improperly suggested that the fact that she was terminated from the employing establishment for misconduct effective September 4, 2009 served as a bar to her receipt of disability compensation after that point. The Board has held that, even if a claimant

¹⁵ *Id.*

¹⁶ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ Dr. Kelly had previously indicated that diagnostic testing from July 24, 2012 showed a high-grade partial or full-thickness tear of appellant's right rotator cuff.

were terminated for misconduct, disability benefits would be payable if the evidence of record established that the claimant was unable to work at some point thereafter due to a work-related disabling condition.¹⁸

The Board finds that OWCP failed to adequately address the medical evidence that appellant submitted in connection with her claim for disability for the period October 17, 2012 to January 18, 2013. OWCP's January 16, 2014 decision will be set aside and the case remanded for consideration of her claim for disability. After such development, it shall issue an appropriate decision on appellant's disability claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she had disability due to her January 30, 2008 work injury for the period October 17, 2012 to January 18, 2013.

¹⁸ See *supra* note 15. OWCP cited its procedure manual in support of its position. However, it failed to note that the same portion of its procedure manual states that disability could be established when inability to work was caused by a "spontaneous material change, demonstrated by objective findings, in the medical condition which resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness." See *supra* note 6 at Chapter 2.1500.3b(1)(a). OWCP also cited the cases *Bruce Johnson* and *John W. Normand*, but both cases note that disability could be established despite termination for cause if medical evidence were submitted to establish that the claimant could not work due to the accepted work injury for a given period after the termination. See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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