



## **FACTUAL HISTORY**

On June 9, 2012 appellant, then a 52-year-old rural carrier associate, filed a traumatic injury claim alleging that, on that date, she injured her middle back, left arm, and shoulders when she lifted a box where one side was heavier than the other. OWCP accepted the claim for neck and thoracic strains. Appellant returned to full duty on September 12, 2012.

On May 15, 2013 appellant filed a claim for a recurrence of disability causally related to her accepted June 9, 2012 employment injury. She alleged that she had consistent pain since the original injury, which she alleged was never cured, and requested compensation for financial loss incurred due to the accepted employment injury. On the back of the form, the employing establishment noted that appellant returned to full-duty work with no accommodations.

By letter dated May 20, 2013, OWCP informed appellant as to the definition of a recurrence and the evidence required to support this type of claim. Appellant was given 30 days to provide the requested information.

Appellant submitted a May 2, 2013 magnetic resonance imaging (MRI) scan of the left shoulder, which showed a full thickness supraspinatus tendon tear with diffuse tendon contusion. A May 6, 2013 prescription note by Dr. Vineet P. Shah, a treating osteopathic Board-certified orthopedic surgeon, recommended light-duty work due to a left rotator cuff tear.

In a May 15, 2013 left upper extremity electromyogram and nerve conduction studies report, Dr. Arif Dalvi, an examining Board-certified neurologist, reported that findings from the studies performed were within normal range. He found no electrodiagnostic evidence of peripheral polyneuropathy, myopathic process, plexopathy, or left upper extremity radiculopathy.

In a June 10, 2013 statement, appellant related that her original injury never completely healed and, as her workday progresses, her pain increases. She listed the activities that she performed following her return to work after her injury, which included repetitive motion, casing mail, delivering mail, carrying and lifting heavy tubs of mail, and loading heavy tubs of mail into the mail vehicle. Lastly, appellant stated that her pain has been daily since the original injury with no cessation.

OWCP also received rehabilitation prescription notes dated April 24 and July 17, 2013 from Dr. Shah diagnosing cervical and trapezius strains and recommending physical therapy.

In an August 9, 2013 report, Dr. John M. Diveris, an examining Board-certified orthopedic surgeon, diagnosed left brachial radiculitis or neuritis and left shoulder bursae and tendons disorders. Appellant related that she injured herself at work on June 9, 2012 due to stepping wrong and falling while carrying a large heavy box. A physical examination of the left shoulder revealed no swelling, atrophy, deformity, or ecchymosis, acromioclavicular joint tenderness, and normal cervical spine range of motion. Dr. Diveris stated that appellant could return to work with no restrictions.

In an August 12, 2013 patient work status report, Dr. Diveris diagnosed left brachial neuritis or radiculitis and left shoulder tendons and bursae disorders. He released appellant to

return to work with no restrictions. Dr. Diveris, on August 22, 2013, provided physical examination findings and diagnosed impingement syndrome, and cervico/brachial nondisc radiculitis. He stated that appellant was able to return to work with no restrictions.

On September 10, 2013 Dr. Diveris diagnosed left upper arm and shoulder strains, left trapezial peri-scapular, left disorders of bursae and unspecific shoulder region tendons, and left brachial neuritis or radiculitis. He referred appellant for physical therapy.

The record contains physical therapy treatment reports for the period September 16 to October 15, 2013 from Savita Chatfield, a licensed physical therapist. Diagnoses in the reports included upper arm and shoulder sprains, shoulder region bursa disruption, and brachial radiculitis.

Dr. Diveris, in reports dated October 17 and 24, 2013, stated that appellant was seen in a follow-up visit for supraspinatus muscle sprain and/or tendon, shoulder region bursa disorder, shoulder and upper arm sprain, and brachial radiculitis. Physical examination findings and medical history were provided. Dr. Diveris found appellant able to work with no restrictions.

In a November 13, 2013 patient work status report and November 19, 2013 duty status report (Form CA-17), Dr. Diveris diagnosed supraspinatus muscle sprain and/or tendon, shoulder region bursa disorder, shoulder and upper arm sprain, and brachial radiculitis and stated that she was able to work with restrictions. The restrictions included no lifting or carrying more than five pounds with her left arm and no driving after casing mail.

Appellant filed claims for wage-loss compensation for the period November 23 to December 13, 2013.

In a letter dated January 3, 2014, OWCP informed appellant that the evidence was insufficient to support her claim for wage-loss compensation. It advised her as to the evidence required to support her claim for wage-loss compensation.

By decision dated January 16, 2014, OWCP denied appellant's recurrence claim.<sup>2</sup>

On February 5, 2014 appellant requested reconsideration of the January 16, 2014 decision.

Appellant filed claims for wage-loss compensation for the period February 4 to May 16, 2014.

In a February 13, 2014 report, Dr. Diveris noted that appellant sustained an employment injury on June 9, 2012 which her then treating physician attributed as a neck problem. He first saw her on August 9, 2013 when he found that she also had a shoulder problem, which he described as rotator cuff intrasubstance degeneration and subacromial bursitis. Dr. Diveris noted that appellant had been evaluated by a spinal surgeon who attributed her problem as primarily

---

<sup>2</sup> OWCP noted the date of appellant's recurrence as May 16, 2013, which was the date the employing establishment signed the recurrence form. The date appellant signed the form was May 15, 2013.

due to a trapezius shoulder muscle strain, shoulder impingement syndrome, and rotator cuff tendon strain.

Dr. Diveris, in a patient work status report dated February 13, 2014, diagnosed left rotator cuff problems, left shoulder and upper arm sprain, left brachial radiculitis, strain of the left supraspinatus muscle and/or tendon, and disorder of the left shoulder bursa. He indicated that there was no change in either her condition or work restrictions.

In a February 13, 2013 treatment note, Dr. Diveris, noted the employment injury and medical histories. A review of a May 2, 2013 MRI scan revealed left supraspinatus tendon intrasubstance degeneration. Diagnoses included disorders of the left shoulder bursae and tendons, strain/sprain of the left shoulder and upper arms; supraspinatus muscle/tendon, and left brachial radiculitis or neuritis. Dr. Diveris indicated that appellant was capable of working with restrictions.

By decision dated May 8, 2014, OWCP denied modification of its January 16, 2014 decision denying her recurrence claim.

By decision dated May 30, 2014, OWCP denied appellant's claims for wage-loss compensation for the period November 23, 2013 and continuing. It found that none of the medical evidence submitted contained a rationalized medical opinion explaining how her disability from working and her medical condition were causally related to her accepted employment injuries of neck and thoracic strains.

On a form dated June 3, 2014 received by OWCP's Branch of Hearings and Review on June 11, 2014, appellant requested a telephonic hearing before an OWCP hearing representative regarding the January 16, 2014 decision denying her claim for a recurrence of disability.

By decision dated June 17, 2014, OWCP's Branch of Hearings and Review denied appellant's request for a hearing before an OWCP hearing representative as she had previously requested reconsideration under 5 U.S.C. § 8128(a). It exercised its discretion and further denied the hearing because the issue could equally well be addressed during the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

A 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>3</sup> If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.<sup>4</sup>

---

<sup>3</sup> 20 C.F.R. § 10.5(x). See also *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (June 2013); *K.C.*, Docket No. 08-2222 (issued July 23, 2009); *Cecelia M. Corley*, 56 ECAB 662 (2005); *Donald T. Pippin*, 54 ECAB 631 (2003).

## ANALYSIS -- ISSUE 1

OWCP accepted the conditions of neck and thoracic strains as due to the accepted June 9, 2012 employment injury. On May 15, 2013 appellant filed a claim for a recurrence of disability in which she alleged that her condition had not been cured, that she continued to experience pain, and that she suffered financial loss. By decisions dated January 16 and May 8, 2014, OWCP denied her recurrence. The issue on appeal is whether appellant met her burden of proof to establish a recurrence of disability due to the accepted June 9, 2012 employment injury. The Board finds that she failed to meet her burden.

In support of her claim appellant submitted reports from Drs. Diveris and Shah. Dr. Shah recommended light-duty work in a May 6, 2013 report and recommended physical therapy on prescription notes dated April 24 and July 17, 2013. Similarly, Dr. Diveris also stated that appellant was able to work with restrictions in a November 13, 2013 patient work status report and in a November 19, 2013 duty status report. However, in earlier reports from August 9 to October 24, 2013, he stated that she could work with no restrictions. As neither physician provided an opinion that appellant was totally disabled from working, these reports are insufficient to establish her claim for a recurrence of disability. In addition, none of the reports from either Dr. Diveris or Dr. Shah provided any opinion regarding her claimed recurrence of disability and, thus, these reports are of diminished probative value and insufficient to establish her recurrence claim.<sup>5</sup>

Appellant also submitted reports from Ms. Chatfield, a licensed physical therapist. However, records from a physical therapist do not constitute competent medical opinion in support of causal relationship. A physical therapist is not a physician as defined under FECA.<sup>6</sup>

As well, the reports of diagnostic studies and MRI scans do not provide any opinion as to the cause of appellant's condition.<sup>7</sup>

It is appellant's burden of proof to provide evidence from a qualified physician to support the recurrence of total disability for any period of time. She failed to submit rationalized medical evidence establishing that her claimed recurrence of total disability commencing May 15, 2013 was causally related to the accepted employment conditions. The Board therefore affirms the May 8, 2014 OWCP decision concerning the denial of compensation based on a recurrence of appellant's work-related disability.

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.

---

<sup>5</sup> See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>6</sup> A.C., Docket No. 08-1453 (issued November 18, 2008). Under FECA, a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). See *Allen C. Hundley*, 53 ECAB 551 (2002); *Lyle E. Dayberry*, 9 ECAB 369 (1998).

<sup>7</sup> See *Mary E. Marshall*, 56 ECAB 420 (2005).

## LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA<sup>8</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>9</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>10</sup> 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.<sup>11</sup>

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>12</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>13</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>14</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

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 their disability and entitlement to compensation.<sup>15</sup>

## ANALYSIS -- ISSUE 2

As noted above, OWCP accepted appellant’s claim for neck and thoracic strains. Appellant submitted claims for wage-loss compensation for the period November 23, 2013 to May 16, 2014. By decision dated May 30, 2014, OWCP denied her claim for wage-loss compensation because the medical evidence of record failed to establish that she was totally disabled due to her accepted employment injuries. When determining whether appellant’s

---

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

<sup>10</sup> See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

<sup>11</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>12</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

<sup>13</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>14</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>15</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

burden of proof has been met, the Board considers factors such as whether there are objective findings, a thorough understanding of the job duties by the physician, a firm diagnosis, and a rationalized, unequivocal opinion that she was disabled due to the employment injury for the period claimed.<sup>16</sup> Appellant has not met her burden of proof in this case.

In support of her claim for wage-loss compensation on and after November 23, 2013 appellant submitted a February 13, 2014 report by Dr. Diveris who concluded that she sustained a rotator cuff intrasubstance degeneration and subacromial bursitis due to the sustained June 9, 2012 employment injury. He noted that her then treating physician found that she had only sustained a neck problem as a result of the June 9, 2012 employment injury. OWCP has not accepted the conditions of rotator cuff intrasubstance degeneration and subacromial bursitis. Thus, it is appellant's burden to establish that these conditions were causally related to the accepted June 9, 2012 employment injury.<sup>17</sup> Dr. Diveris had concluded that she was able to work with restrictions. None of his reports establish total disability. The Board finds that reports from Dr. Diveris are insufficient to support appellant's claim as he did not find her to be totally disabled due to the effects of the accepted employment injury.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8124(b)(1) of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.<sup>19</sup> Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>20</sup> OWCP's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>21</sup>

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.<sup>22</sup> OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after

---

<sup>16</sup> *V.M.*, Docket No. 10-1056 (issued December 16, 2010); *see L.D.*, Docket No. 09-1503 (issued April 15, 2010); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>17</sup> *See Mary A. Celia*, 55 ECAB 626 (2004).

<sup>18</sup> *See A.D.*, 58 ECAB 149 (2006); *Ellen L. Noble*, 55 ECAB 530 (2004) (the Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>19</sup> 5 U.S.C. § 8124(b)(1). *See A.B.*, 58 ECAB 546 (2007); *Gerard F. Workinger*, 56 ECAB 259 (2005).

<sup>20</sup> 20 C.F.R. § 10.615.

<sup>21</sup> *Id.* at 10.616.

<sup>22</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

reconsideration under section 8128(a), are a proper interpretation of FECA and Board precedent.<sup>23</sup> The only limitation on OWCP's authority is that of reasonableness.<sup>24</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>25</sup>

### **ANALYSIS -- ISSUE 3**

Appellant submitted a request for a hearing before an OWCP hearing representative on a form dated June 3, 2014 and received on June 11, 2014 by the Branch of Hearings and Review. The record establishes, however, that she had previously requested reconsideration on that issue on February 5, 2014. As noted, OWCP regulations provide that a claimant must not have previously requested reconsideration when requesting a hearing before an OWCP hearing representative whether or not the reconsideration request was granted.<sup>26</sup> Therefore, appellant was not entitled to a hearing as a matter of right.

When a claimant has previously requested reconsideration pursuant to 5 U.S.C. § 8128(a) OWCP must exercise its discretionary authority to grant or deny the hearing request. In this case, OWCP considered the issue and found that it could be equally well addressed by submitting new and relevant evidence with an application for reconsideration. This is a proper exercise of OWCP's discretionary authority.<sup>27</sup> The Board finds that OWCP did not abuse its discretion in denying appellant's hearing request.

### **CONCLUSION**

The Board finds that appellant failed to establish a recurrence of disability beginning May 15, 2013. The Board also finds that she has failed to establish wage-loss compensation on and after November 23, 2013. The Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative.

---

<sup>23</sup> See *Lawrence C. Parr*, 48 ECAB 445 (1997); *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>24</sup> See *Joe E. Williamson*, 36 ECAB 494 (1985).

<sup>25</sup> See *Rosa Lee Jones*, 36 ECAB 679 (1985).

<sup>26</sup> *Supra* note 21.

<sup>27</sup> See *Lawrence C. Parr*, *supra* note 23.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 17 and May 30 and 8, 2014 are affirmed.

Issued: April 3, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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