

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

V.C., Appellant)

and)

U.S. POSTAL SERVICE, CIRCLE BRANCH)
POST OFFICE, Trenton, NJ, Employer)

**Docket No. 14-1252
Issued: March 11, 2015**

Appearances:

Thomas R. Uliase, Esq., 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 May 7, 2014 appellant, through his attorney, filed a timely appeal from a January 14, 2014 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits effective November 13, 2012 as he had no residuals of the accepted bicipital tendinitis; and (2) whether appellant met his burden of proof to establish that he had any employment-related disability due to the accepted condition after January 31, 2013, the date he retired.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, counsel asserts that because a new condition was accepted after the termination of appellant's benefits on November 13, 2012, he would be entitled to wage-loss compensation and medical benefits, effective that day.

FACTUAL HISTORY

On September 13, 2011 appellant, then a 55-year-old window clerk, filed a traumatic injury claim alleging that on September 9, 2011 he injured his right shoulder picking up heavy mail. The claim was accepted for right rotator cuff sprain and right rotator cuff tear. On January 24, 2012 Dr. Scott Miller, a Board-certified orthopedic surgeon, performed a rotator cuff repair and resection of the distal clavicle. Appellant stopped work that day and received wage-loss compensation.

Appellant began a work hardening program on May 7, 2012. In a May 21, 2012 report, Dr. Miller indicated that appellant was progressing but could not return to work, noting that he continued to need physical therapy and work hardening. He projected a return-to-work date of August 2012.

OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. In a May 23, 2012 report, Dr. Heist noted the history of injury and his review of the statement of accepted facts and medical record. He provided physical examination findings and diagnosed status postoperative arthroscopic repair of right rotator cuff tear. Dr. Heist advised that he agreed with Dr. Miller that a return to work of August 2012 was reasonable and at that time appellant would likely be able to return to full duty without restrictions.

Appellant continued work hardening. On June 25, 2012 Dr. Miller reported that appellant was only at 50 percent. He indicated that it was not clear if he could return to work on August 1, 2012 and could be delayed until September 1, 2012. On August 23, 2012 Dr. Miller reported that appellant continued work hardening and was still having constant right shoulder pain with tenderness on examination of the anterior shoulder. He advised that, because appellant was 15 pounds away from his goal, he should remain off work. On September 12, 2012 Dr. Miller noted that appellant was making slow progress and again advised that he could not work, with a projected return-to-work date of mid-October.

On September 13, 2012 OWCP again referred appellant to Dr. Heist for a second opinion evaluation. In a September 26, 2012 report, Dr. Heist noted his previous examination and report and that appellant had work hardening. He indicated that at present appellant reported that he still had difficulty lifting heavy objects and reaching above shoulder level. Dr. Heist provided physical examination findings, including right shoulder range of motion. He advised that the accepted conditions of right rotator cuff tear and sprain of the right shoulder had resolved following the January 24, 2012 surgery and concluded that appellant could return to full-time work as a window clerk with no restrictions. On October 1, 2012 Jessica Coe, a physical therapist, who conducted work hardening, indicated that appellant attended 63 visits and had achieved lifting capability within the medium-heavy level needed to return to work. On a duty status report dated October 3, 2012, Dr. Miller indicated that appellant could not return to work.

In an October 10, 2012 letter, OWCP proposed to terminate appellant's wage-loss and medical benefits as the medical evidence, characterized by Dr. Heist's report, established that appellant no longer had residuals or disability due to the accepted conditions.

In a treatment note dated October 3, 2012, received by OWCP on October 12, 2012, Dr. Miller stated that, objectively, appellant's right shoulder had excellent mobility but that he was concerned because appellant had persistent tenderness over the greater tuberosity. He recommended a magnetic resonance imaging (MRI) scan study and concluded that appellant did not yet meet work requirements.

Appellant, through counsel, disagreed with the proposed termination, maintaining that, as appellant's window clerk position required lifting up to 70 pounds occasionally and 35 pounds continuously, Dr. Heist should be provided the position description for review. In reports dated November 5, 2012, Dr. Miller noted that an MRI scan showed residual evidence of tendinitis of the supraspinatus and of biceps tendinitis. Examination showed point tenderness over the biceps tendon, which he injected, and good mobility of the shoulder. Dr. Miller noted that physical therapy had informed him that appellant had plateaued and he basically met work requirements. He indicated that appellant's residual pain was related to persistent biceps tendinitis. Ultrasound done that day indicated that the rotator cuff insertion was intact. Dr. Miller advised that appellant could return to work on November 10, 2012. Appellant's only restriction was no continuous lifting above the shoulder.

By decision dated November 13, 2012, OWCP finalized the termination of wage-loss compensation and medical benefits. Appellant, through counsel, timely requested a hearing. In reports dated November 28, 2012 through January 30, 2013, Dr. Miller noted appellant's complaint of continued pain and advised that he could continue to work. He indicated that the residual biceps tendinitis limited appellant's work activities, and on December 31, 2012 placed a lifting restriction of 50 pounds. Dr. Miller recommended additional surgery.

At the hearing, held on March 25, 2013, appellant testified that he continued to work with some difficulty following the September 9, 2011 employment injury until he had surgery in January 2012. He returned to work on November 13, 2012 with lifting restrictions for the nonaccepted condition of tendinitis, he retired on January 31, 2013, taking a buy-out, and was currently working in private employment. Counsel indicated that there was no wage-loss claim but, since appellant needed further surgery due to residuals of the employment injury, a recurrence claim could be filed in the future.

In correspondence dated April 8, 2013, the employing establishment confirmed that appellant retired effective January 31, 2013 with a special \$15,000.00 incentive. On April 29, 2013 counsel forwarded an April 18, 2013 report in which Dr. Miller described appellant's care, noting that he had continued complaints of pain following the January 2012 surgery. Dr. Miller described October 2012 MRI scan study findings and indicated that when appellant was seen on November 5, 2012, he could lift 70 pounds, just not over his head, and that he was allowed to return to work with a restriction against heavy overhead lifting. He noted that, when he next saw appellant on November 28, 2012, it was evident that work activity caused more pain but that appellant was able to continue modified duty until he retired. Dr. Miller advised that appellant needed additional corrective surgery due to the September 2011 employment injury.

By decision dated June 12, 2013, an OWCP hearing representative found the weight of the evidence rested with the opinion of Dr. Heist and affirmed the November 13, 2012 decision terminating appellant's wage-loss and medical benefits. The hearing representative, however, remanded the case to OWCP for referral to its medical adviser for review and comment with regard to the newly submitted evidence as to whether it supported a diagnosis of consequential right biceps tendinitis and the need for additional surgery.

On July 23, 2013 OWCP asked Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, to review the June 12, 2013 hearing representative decision, the Statement of Accepted Facts, and a job description, and to respond to questions regarding whether appellant's right biceps tendinitis was related to the September 9, 2011 employment injury and, if so, was surgery warranted. In a July 25, 2013 report, Dr. Magliato advised that the biceps condition was related to the September 9, 2011 employment injury and that the surgery recommended by Dr. Miller was warranted. On August 9, 2013 he indicated that the employment injury either aggravated a preexisting bicipital tendinitis or actually caused it and advised that it should be accepted as part of the September 9, 2011 employment injury. On August 26, 2013 Dr. Magliato indicated that it was more likely that the employment incident of September 9, 2011 caused the right biceps condition.

On October 7, 2013 OWCP accepted right bicipital tendinitis. It also informed Dr. Miller that the proposed surgery was authorized. On October 16, 2013 appellant, through counsel, requested reconsideration, asserting that the June 12, 2013 decision should be vacated and appellant's wage-loss compensation restored.

In October 30, 2013 reports, Dr. Miller provided examination findings and diagnosed bicipital tenosynovitis. He indicated that appellant could work modified duty with a 10- to 25-pound lifting, pushing and pulling restriction, and no overhead work. Surgery would be scheduled at appellant's earliest convenience.

In a January 14, 2014 decision, OWCP denied appellant's claim for resumption of wage-loss compensation. It noted that, at the March 25, 2013 hearing, counsel indicated that there were no wage-loss claims, and the record did not indicate that appellant filed either a recurrence claim or claims for wage-loss compensation.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

² *Jaja K. Asaramo*, 55 ECAB 200 (2004).

³ *Id.*

ANALYSIS -- ISSUE 1

OWCP accepted that on September 13, 2011 appellant suffered a right rotator cuff sprain and rotator cuff tear. On November 13, 2012 it terminated his wage-loss compensation and medical benefits. The Board finds that the weight of the medical opinion is represented by the opinion of Dr. Heist, who examined appellant at the request of OWCP and provided an accurate and complete factual and medical background of appellant's condition in his September 26, 2012 report.

In a September 26, 2012 report, Dr. Heist indicated that at the present appellant reported that he still had difficulty lifting heavy objects and reaching above shoulder level. He provided physical examination findings, including right shoulder range of motion. Dr. Heist advised that the accepted conditions of right rotator cuff tear and sprain of the right shoulder had resolved following the January 24, 2012 surgery and concluded that appellant could return to full-time work as a window clerk with no restrictions.

In reports dated November 5, 2012, Dr. Miller stated that physical therapy had informed him that appellant had plateaued and that he basically met work requirements. He noted point tenderness over the biceps tendon and good mobility of the shoulder and indicated that appellant's residual pain was related to persistent biceps tendinitis, which he injected. Ultrasound done that day indicated that the rotator cuff insertion was intact. Dr. Miller advised that appellant could return to work on November 10, 2012 with a restriction of no continuous lifting above the shoulder.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report.⁴

The Board finds that OWCP properly determined that the weight of the medical opinion evidence rested with the opinion of Dr. Heist, who provided a comprehensive report in which he outlined examination findings and provided a rationalized explanation for his opinion that appellant's accepted right shoulder conditions had resolved. Moreover, Dr. Miller indicated on November 5, 2012 that appellant's restrictions were due to biceps tendinitis and not to his rotator cuff *per se*. He advised that appellant could return to work, and appellant returned to modified duty on November 13, 2012. OWCP therefore met its burden of proof to terminate appellant's compensation benefits on November 13, 2012 due to the resolution of the accepted rotator cuff sprain and rotator cuff tear.

⁴ *Michael S. Mina, 57 ECAB 379 (2006).*

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate wage-loss compensation on November 13, 2012, the burden shifted to appellant to establish any disability causally related to the accepted rotator cuff conditions.⁵

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.⁶ 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.⁷ 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.⁸ 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.⁹

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.¹⁰

ANALYSIS -- ISSUE 2

Following the termination of compensation benefits on November 13, 2012, OWCP accepted an additional condition, right bicipital tendinitis. Counsel asserts that appellant’s wage-loss compensation be restored effective November 13, 2012. As appellant testified at the March 25, 2013 hearing, however, he returned to modified duty on November 13, 2012 and continued working until he retired on January 31, 2013. He further testified at the

⁵ See *Daniel F. O’Donnell, Jr.*, 54 ECAB 456 (2003).

⁶ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁷ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁸ *Corlisa Sims*, 46 ECAB 963 (1995).

⁹ *Tammy L. Medley*, 55 ECAB 182 (2003).

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

March 25, 2013 hearing that he was then working. The record also indicates that appellant retired with a \$15,000.00 special retirement incentive.¹¹

Voluntary retirement does not, by itself, raise an issue of disability.¹² In order for appellant to be entitled to any disability compensation, he must establish that he is disabled from the modified duties he was performing at the time he retired.¹³ He testified at the hearing that when he retired on January 31, 2013, he was working modified duty with lifting restrictions. On April 18, 2013 Dr. Miller indicated that when appellant was seen on November 5, 2012, he could lift 70 pounds, just not over his head, and advised that he could return to work with a restriction against heavy overhead lifting. While he advised that appellant had increased pain when seen on November 28, 2012, he noted that appellant continued to work modified duty until he retired. Thus, as the record does not establish that appellant was disabled from his modified duties when he retired, he would not be entitled to wage-loss compensation after that date.¹⁴

Appellant, however, would be entitled to medical benefits for the bicipital tendinitis condition, accepted by OWCP on October 7, 2013. Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.¹⁵ Dr. Miller consistently advised that appellant needed surgery for this condition, and Dr. Magliato, an OWCP medical adviser, agreed on July 25, 2013 that the surgery recommended by Dr. Miller was warranted. OWCP authorized the requested surgery.¹⁶

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.

¹¹ Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. OWCP procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.c(1) (June 2009). Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay. See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005). Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents. *L.J.*, Docket No. 10-510 (issued October 1, 2010).

¹² *J.H.*, Docket No. 14-540 (issued July 1, 2014).

¹³ *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁴ The record does not indicate that he filed either a recurrence claim or a Form CA-7 claim for compensation following his retirement.

¹⁵ 5 U.S.C. § 8103; *W.M.*, 59 ECAB 132 (2007).

¹⁶ OWCP procedures provide that, if surgery is authorized, the claims examiner should request a surgery date and expected period of disability. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disability Management*, Chapter 2.600.7(d)(2) (September 2010).

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits on November 13, 2012 and that he is not entitled to wage-loss compensation after he retired on January 21, 2013. Appellant, however, is entitled to medical benefits for the condition bicipital tendinitis, accepted on October 7, 2013.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: March 11, 2015
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