

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

G.C., Appellant)

and)

U.S. POSTAL SERVICE, MAIN POST OFFICE,)
Massapequa Park, NY, Employer)

**Docket No. 14-1943
Issued: May 4, 2015**

Appearances:
Paul Kalker, Esq., for appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2014 appellant, through counsel, filed a timely appeal from a July 30, 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.

ISSUE

The issue is whether appellant established a recurrence of disability commencing March 24, 2012.

FACTUAL HISTORY

OWCP accepted that on April 2, 1991 appellant, then a 27-year-old letter carrier, sustained a left shoulder sprain when he tripped and fell on stairs. Appellant did not stop work at the time of injury. OWCP later expanded the claim to accept left cervical radiculitis, left

¹ 5 U.S.C. § 8101 *et seq.*

shoulder impingement, an intervertebral disc disorder with myelopathy, and a herniated C6-7 disc.

Dr. Eric Putterman, an attending Board-certified orthopedic surgeon, limited appellant to working for four hours a day. Appellant worked four hours a day as a modified letter carrier from December 19, 1992 onward. He received compensation for the remaining four hours.²

By decision dated March 8, 1994, OWCP found that the part-time modified letter carrier position that appellant began on December 19, 1992 fairly and reasonably represented his wage-earning capacity. It reduced his compensation beginning March 6, 1994, based on his actual earnings.

On April 25, 1995 Dr. Putterman performed left shoulder arthroscopy to repair anterior and posterior labral tears with acromioclavicular impingement. Appellant received compensation for work absence through June 1996, when he returned to light-duty work.³ Dr. Putterman increased appellant's schedule from four to six hours a day through September 2001.⁴

On February 15, 2002 appellant claimed a recurrence of disability commencing January 29, 2002 while on light duty.⁵ He returned to work for four hours a day as of July 24, 2002 as a modified letter carrier. OWCP issued wage-loss compensation for the remaining four hours a day.

OWCP issued an informal wage-earning capacity determination dated March 25, 2003, based on appellant's actual earnings of \$409.95 a week as a part-time modified letter carrier. Appellant continued to work four hours a day in the modified position through May 2007. OWCP accepted a recurrence of disability commencing June 28, 2007 as work was not available within his medical restrictions. Appellant continued to work part-time light duty up to four hours a day and claimed compensation for the remaining hours.

In a November 12, 2008 memorandum, OWCP noted that the March 8, 1994 wage-earning capacity determination should have been vacated by the April 25, 1995 surgery and subsequent 13 months of total disability. It advised that there was no current wage-earning capacity determination in effect. OWCP continued to issue wage-loss compensation.

² Dr. William A. Healy, Jr., a Board-certified orthopedic surgeon performing a fitness-for-duty examination for the employing establishment, found appellant able to work eight hours a day, limited duty, as of September 29, 1993.

³ OWCP obtained a second opinion from Dr. Healy on February 29, 1996, who opined that appellant could perform sedentary work for eight hours a day.

⁴ Dr. Putterman noted on June 1, 2006 that magnetic resonance imaging (MRI) scan studies demonstrated continued degeneration in the cervical spine and left shoulder.

⁵ A January 4, 2002 MRI scan arthrogram of the left shoulder revealed no evidence of rotator cuff or labral tear, and mild instability of the left shoulder.

On November 6, 2009 Dr. Putterman restricted appellant to working no more than four hours a day due to increasing cervical radiculopathy and left shoulder instability. Beginning on March 4, 2010 appellant worked four hours a day.

On December 14, 2011 appellant accepted a light-duty job offer as a modified letter carrier for two hours a day, working from 6:00 a.m. to 8:00 a.m. The job required up to one hour of reaching, up to one hour of throwing or casing mail, and up to one hour of delivering express mail. The position was within Dr. Putterman's restrictions.

In a December 21, 2011 report, Dr. Putterman diagnosed recurrent subluxation of the left shoulder.⁶ As of March 15, 2012, he restricted appellant from driving before 9:00 a.m., due to the sedating effect of medications prescribed for the accepted injuries.

On April 6, 2012 appellant claimed a recurrence of disability commencing March 24, 2012 as the employing establishment withdrew his light-duty job. He also asserted that casing mail aggravated his neck and left shoulder, disabling him from work. Appellant stopped work on March 24, 2012. He claimed compensation from March 24 to April 6, 2012.

In an April 13, 2012 letter, the employing establishment clarified that it had not withdrawn appellant's light-duty position. Appellant was precluded from performing the job as Dr. Putterman prohibited driving before 9:00 a.m. and appellant's duty shift was from 6:00 a.m. to 8:00 a.m.⁷

By decision dated September 24, 2012, OWCP denied the claim finding that appellant had not established a basis for modifying the March 8, 1994 wage-earning capacity decision.

Appellant requested a telephonic hearing that was held on February 12, 2013. During the hearing, he asserted that his condition had worsened such that he could no longer perform his light-duty job. In support of this contention, appellant submitted an October 12, 2012 report from Dr. Phillip N. Fyman, an attending Board-certified anesthesiologist, recommending trigger point and epidural injections.⁸ On March 14, 2013 Dr. Mitchell Goldstein, an attending Board-certified orthopedic surgeon, opined that "repetitive work motion and activity" increased appellant's "cervical spine and shoulder orthopedic pathology forcing him to stop work." Dr. Putterman continued to restrict appellant to working four hours a day, with no driving before 9:00 a.m.

In a May 7, 2013 decision, an OWCP hearing representative set aside the September 24, 2012 decision. He found that the March 8, 1994 wage-earning capacity decision was erroneous

⁶ A February 22, 2012 cervical MRI scan showed a C3-4 disc herniation, posterior disc-osteophyte complexes from C2 to C7, causing mild central canal stenosis from C3 to C7 with compression of the right C4, C6, and C7 nerve roots. A February 23, 2012 MRI scan arthrogram left shoulder showed an anterior labral tear. March 1, 2012 electromyogram and nerve conduction velocity studies showed bilateral mild median neuropathy at the wrists, worse on the left, without evidence of cervical radiculopathy.

⁷ On September 10, 2012 Dr. Putterman restricted appellant from casing mail.

⁸ Dr. Fyman ordered a February 6, 2013 functional capacity evaluation, finding impairments of both shoulders.

as appellant was a full-time employee before the date of injury and OWCP did not explain how a part-time job was found suitable. The hearing representative found that, as there was no wage-earning capacity decision properly in place, OWCP must consider whether appellant established a disability beginning March 24, 2012. He found that the record required further development and remanded the case for OWCP to obtain a second opinion regarding whether appellant had a recurrence of disability or whether he sustained a work injury between December 2011 and March 2012 due to new occupational exposures.

Appellant submitted additional medical evidence. In an April 30, 2013 report, Dr. Goldstein opined that appellant's duties as of December 2011 aggravated his left shoulder, such that he was not able to work as of March 2012. He found appellant totally disabled for work through October 2013 due to left shoulder instability, a labral tear, and herniated cervical discs.⁹ In an August 12, 2013 report, Dr. Putterman diagnosed chronic left shoulder impingement and cervical radiculopathy. He opined that both conditions were related to the accepted injury.

On November 5, 2013 OWCP obtained a second opinion from Dr. David Benatar, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. On examination, Dr. Benatar noted restricted left shoulder motion due to pain. He diagnosed status post occupational injury with cervical stenosis and possible cervical radiculopathy, and "left shoulder status post arthroscopy with MRI scan evidence of further labrum injury and possible impingement." Dr. Benatar opined that it could not be determined if appellant's work duties between December 2011 and March 2012 aggravated or accelerated his condition as he had only examined appellant considerably after March 2012. He found appellant able to perform light-duty work, noting that appellant could change his medication schedule to avoid being sedated while driving.

By decision dated November 21, 2013, OWCP denied appellant's claim for a recurrence of disability, on the grounds that the medical evidence did not establish that his condition had worsened such that he was no longer able to perform his assigned light-duty job. It accorded the weight of the medical evidence to Dr. Benatar.

In a May 1, 2014 letter, counsel requested reconsideration. He asserted that the medical evidence established that appellant was totally disabled for work as of March 2012. Counsel also contended that there was a conflict of medical opinion between Dr. Benatar and Dr. Goldstein regarding whether appellant's condition worsened such that he was no longer able to work. He submitted additional reports from Dr. Goldstein dated from January 13 to July 7, 2014, finding appellant totally and permanently disabled for work. Dr. Goldstein opined that casing mail from December 2011 to March 2012 aggravated the accepted conditions, requiring increased medication, and preventing him from driving during his shift.

By decision dated July 30, 2014, OWCP affirmed the prior decision, finding that appellant did not establish a spontaneous worsening of the accepted conditions.

⁹ On July 29, 2013 appellant refused a light-duty job offer for four hours a day, requiring casing mail up to four hours, and reaching above the shoulder with the right arm up to two hours. He contended that he was medically unable to work and was in the process of applying for disability retirement.

LEGAL PRECEDENT

OWCP's implementing regulations define a "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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁰ 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 is withdrawn or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.¹¹ Appellant has the burden of establishing that there was no medically appropriate light duty available for the claimed period.¹²

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 the employee 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 disability and to 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.¹³ This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁴ An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on appellant's unsupported belief of causal relation.¹⁵

ANALYSIS

On April 6, 2012 appellant claimed a recurrence of disability commencing March 24, 2012 while on light duty. OWCP denied the claim on September 24, 2012. Following additional development, it issued November 21, 2013 and July 30, 2014 decisions denying the recurrence claim.¹⁶

¹⁰ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). See also *Philip L. Barnes*, 55 ECAB 426 (2004).

¹¹ *J.F.*, 58 ECAB 124 (2006).

¹² *Id.*

¹³ *Albert C. Brown*, 52 ECAB 152 (2000); see also *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁴ *Ronald A. Eldridge*, 53 ECAB 218 (2001); see *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

¹⁵ *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

¹⁶ As there was no formal wage-earning capacity determination in place, the November 21, 2013 and July 30, 2014 decisions properly addressed the issue of recurrence of disability. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.1501.1 (June 2013).

Appellant has the burden of providing sufficient rationalized medical evidence supporting a spontaneous worsening of the accepted cervical radiculitis and left upper extremity injuries.¹⁷ However, he did not assert or establish that the accepted conditions deteriorated on their own. Rather, appellant contended that casing mail at work from December 2011 to March 2012 aggravated his neck and left shoulder conditions. Dr. Goldstein, an attending Board-certified orthopedic surgeon, supported appellant's assertions. He opined that repetitive upper extremity motion at work from December 2011 through March 2012 aggravated appellant's cervical spine and left shoulder, totally disabling him for work. Dr. Goldstein thus attributed appellant's condition on and after March 24, 2012 to new work factors, an intervening cause negating the claimed relationship between the accepted injuries and appellant's ongoing condition.¹⁸ Dr. Fyman, an attending Board-certified anesthesiologist, and Dr. Putterman, an attending Board-certified orthopedic surgeon, did not address causal relationship in their reports. As none of appellant's physicians opined that the accepted neck and left shoulder conditions worsened spontaneously on and after March 24, 2012, their opinions are insufficient to meet appellant's burden of proof.¹⁹

Alternatively, appellant claimed that the employing establishment withdrew light duty on March 24, 2012. The Board has held that withdrawal of a light-duty job formulated to comply with an employee's work-related medical limitations can constitute a recurrence of disability.²⁰ However, there was no withdrawal of light duty in this case. The employing establishment stated in an April 13, 2012 letter that appellant's light-duty position remained open and available. Appellant also contended that his light-duty job was effectively withdrawn as Dr. Putterman restricted him from driving before 9:00 a.m. due to medication side effects, precluding him from delivering mail before 8:00 a.m. as required. However, Dr. Benatar, a Board-certified orthopedic surgeon and second opinion physician, explained that Dr. Putterman's restriction was unnecessary, as appellant could change his medication schedule to be alert and able to drive before 9:00 a.m.

The Board finds that appellant did not submit sufficient medical evidence to establish a spontaneous worsening of the accepted injuries, or a withdrawal of light duty. OWCP's July 30, 2014 decision denying the recurrence claim is therefore proper under the law and facts of this case.

On appeal, counsel contends that OWCP subjected the opinions of appellant's physicians to excessive scrutiny. The Board notes that there is no evidence that OWCP used an improper standard in reviewing these reports. Counsel also asserts that the medical evidence is entirely supportive of appellant's claim for recurrence of disability. As stated above, appellant's

¹⁷ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁸ *D.B.*, Docket No. 13-717 (issued July 24, 2013).

¹⁹ *Ronald A. Eldridge*, *supra* note 14.

²⁰ *Supra* note 11.

physicians did not address the issue or attributed his condition to an intervening cause.²¹ Counsel also argues that OWCP erred by setting aside the 1994 wage-earning capacity determination. However, it is well established that a finding that the original determination was erroneous is sufficient to modify a wage-earning capacity determination.²² There is no evidence that OWCP acted unreasonably in finding that the 1994 wage-earning capacity determination was no longer valid.

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 has not established a recurrence of disability commencing March 24, 2012.

²¹ OWCP has not yet issued a decision consistent with instructions in the hearing representative's May 7, 2013 decision regarding whether appellant sustained a work injury between December 2011 and March 2012 due to new occupational exposures.

²² *Sharon C. Clement*, 55 ECAB 552 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2014 is affirmed.

Issued: May 4, 2015
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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