

In a July 28, 2010 report, Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, advised that, although appellant complained of pain, he found functional shoulder motion bilaterally, negative Neer impingement, negative Hawkins sign, negative drop arm, negative instability, negative speed's test, negative sulcus sign, no acromioclavicular (AC) joint symptoms, and no cross-body abduction. He explained that pain was not an injury and that appellant should resume normal work duties, with no specific restrictions.

Dr. David L. Glaser, a Board-certified orthopedic surgeon, advised in a March 25, 2011 narrative report and duty status report (Form CA-17) that, although appellant could not perform her regular work duties, she could resume work with restrictions.

On July 7, 2011 the employing establishment Office of the Inspector General (OIG) inspectors interviewed Dr. Glaser who determined, after reviewing surveillance video of appellant, that she could return to work full time. On July 8, 2011 OIG inspectors also interviewed Dr. Meller who noted that he had released appellant to work full time in July 2010.

On July 18, 2011 appellant reported for full-duty work but, after an investigatory interview with an OIG inspector, she was issued a notice of emergency placement in off-duty status that same day.² She was subsequently removed from employment by formal notice of removal on September 7, 2011 due to allegations of workers' compensation fraud.

Appellant filed a grievance contesting the emergency placement and removal actions. On December 4, 2012 an arbitrator issued a decision ordering that the emergency placement and removal be reversed and expunged from her official personnel record. The arbitrator directed that appellant be allowed to return to work without restrictions, consistent with the most recent physician's findings, but that she was not entitled to back pay. The arbitrator advised that if appellant refused to return to work, her removal at that time would be deemed to have been for just cause.

The employing establishment advised that management had instructed appellant to return to work on December 14, 2012 but that, upon returning, appellant submitted medical evidence from Dr. Rahul Kapur, a Board-certified family practitioner, finding that she could return to work with permanent restrictions of overhead activity and lifting. As these restrictions did not comply with the arbitrator's directive, by decision dated December 20, 2012, the employing establishment terminated her employment for cause.

On December 17, 2012 appellant filed a recurrence of disability claim (Form CA-2a) for the period July 18, 2011 to December 14, 2012 alleging that she stopped work on July 18, 2011 because no work was available and that her pay stopped on July 18, 2011 when she was placed on unpaid suspension.

The employing establishment controverted the recurrence claim contending that the arbitrator's decision of December 4, 2012 instructed appellant to return to full-duty employment,

² Appellant clocked in and was paid for four hours of work on July 18, 2011, but it appears from the record that appellant had not actually resumed her duties as a mail processing clerk before being placed in off-duty status.

but that she had returned to work with physician-assigned restrictions and that, therefore, she was terminated from employment by notice dated December 20, 2012.

In a decision dated December 18, 2013, OWCP denied her claim for a recurrence of disability from July 18, 2011 to December 13, 2012, finding that the medical evidence of record failed to establish disability from work or that she required light-duty accommodations after July 18, 2011. Rather, it found she was off work during the claimed period due to a work-related administrative matter. Appellant requested a telephone hearing, which was held on July 16, 2014. By decision dated September 23, 2014, an OWCP hearing representative affirmed the December 18, 2013 decision, finding that appellant had failed to submit rationalized medical evidence to establish that her claimed shoulder injury and resultant total disability were due to her accepted employment injuries. Appellant subsequently requested reconsideration. By decision dated April 6, 2015, OWCP denied modification of the September 23, 2014 decision.

The Board notes that appellant received disability compensation on the supplemental rolls from February 27, 2010 until April 27, 2011 when she was placed on the periodic rolls. Appellant remained on the periodic rolls until July 18, 2011. She reported to work on July 18, 2011, at which time she was interviewed by an OIG inspector, was issued an emergency placement in off-duty status, and was thereafter issued a formal notice of removal on September 7, 2011. Per the December 4, 2012 arbitration award, the suspension and removal actions were reversed and expunged from her personnel record. The arbitrator, however, did not order back pay for the period she was off work. Appellant is now claiming a recurrence of disability for that period.

The Board is unable to determine from the evidence of record the status of appellant's wage-loss compensation benefits as of July 18, 2011. Although OWCP terminated appellant's wage-loss compensation benefits on July 18, 2011, the record does not contain a preliminary or final notice of termination of compensation.³

The Board has held that compensation benefits constitute a property interest protected by the due process clause. Reduction of benefits prior to the issuance of a pretermination notice defeats the purpose of OWCP procedures that provide for notice before reduction of benefits.⁴ OWCP's procedure manual notes situations in which a pretermination notice is not required. One of these situations is when an employee returns to work; however, it further notes that, as in the current case, if an employee is on the periodic rolls, a pretermination notice is required.⁵

³ OWCP's Federal (FECA) Procedure Manual specifies procedural requirements for termination of compensation benefits, including issuance of a pretermination notice. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4b(3) (February 2013) The procedure manual, as supported by Board precedent, further states that a final decision terminating benefits should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance. Federal (FECA) Procedure Manual at Chapter 2.1400.5 (February 2013).

⁴ See *Felix Voyles*, 46 ECAB 895 (1995).

⁵ *Supra* note 3.

In light of the fact that the July 18, 2011 emergency placement and September 7, 2011 removal actions were reversed and expunged from appellant's personnel record, the burden remains on OWCP to properly terminate appellant's compensation benefits.⁶ Without a proper notice of termination of compensation in the record, the Board is unable to review the merits of the denial of appellant's recurrence of disability claim.

The case must be returned to OWCP for determination of appellant's compensation status on and after July 18, 2011. Following this and any other further development deemed necessary, OWCP shall issue an appropriate decision.

IT IS HEREBY ORDERED THAT the April 6, 2015 Office of Workers' Compensation Programs' decision is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: September 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁶ The record contains a July 19, 2011 e-mail correspondence chain wherein an employing establishment human resources manager noted that no final termination of benefits notice would be issued as appellant had returned to work in full-duty capacity on July 18, 2011 and that appellant could submit a Form CA-2a to receive additional compensation benefits.