

FACTUAL HISTORY

On December 19, 2002 appellant, then a 68-year-old immigration inspector trainee, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2002 he sustained injury when, during a training class at the Federal Law Enforcement Training Center in Glynco, GA, he was role playing as an assailant fighting two officers.³ He indicated that the two officers grabbed his arms, twisted them, and forced him down on a mat, where he landed on his left shoulder and chest.⁴

On December 21, 2002 appellant was unable to support his right arm with his left arm during firearms qualification testing required to work as an immigration inspector. He did not qualify and was terminated from his position with the employing establishment effective December 26, 2002.

In July 2003 OWCP accepted appellant's claim for other affections of the left shoulder region, not elsewhere classified, impingement syndrome of the left shoulder, and left rotator cuff tear.⁵ Appellant received continuation of pay from December 26, 2002 to February 9, 2003 and received wage-loss compensation on the daily roll beginning February 10, 2003.

On August 26, 2003 appellant underwent left shoulder arthroscopy with limited joint debridement and open rotator cuff repair. The procedure was authorized by OWCP.

On April 4, 2004 appellant returned to full-time work with the employing establishment's Citizenship and Immigration Service as a center adjudication officer.⁶ He stopped work on May 5, 2005 at the expiration of his one-year term appointment, which the employing establishment did not extend or renew.⁷

On July 5, 2005 appellant filed a recurrence claim (Form CA-2a) alleging that on May 5, 2005 he sustained a recurrence of disability due to his December 19, 2002 work injury. He claimed that his work stoppage on May 5, 2005 was necessitated by residuals of his December 19, 2002 work injury. Appellant indicated that on May 16, 2005, while on vacation, he felt a terrible pain in his right shoulder. He reportedly had been knocked over by a wave while swimming, and when he reached behind to catch himself he experienced right shoulder

³ Appellant was employed as an immigration inspector with a one-year probationary period beginning October 6, 2002.

⁴ Appellant did not stop work on December 19, 2002.

⁵ Appellant's preexisting conditions include left acromioclavicular joint arthritis and military service-related bilateral knee degenerative joint disease.

⁶ Appellant stopped receiving disability compensation on the daily rolls effective April 4, 2004.

⁷ On June 28, 2004 appellant filed a claim for compensation (Form CA-7) for a schedule award due to his December 19, 2002 work injury. On December 9, 2004 OWCP granted him a schedule award for two percent permanent impairment of his left upper extremity. On March 6, 2009 appellant received a schedule award for an additional 11 percent permanent impairment of his left upper extremity and, on August 1, 2011, he received a schedule award for 12 percent permanent impairment of his right upper extremity.

pain. Appellant expressed his belief that May 16, 2005 incident demonstrated that on December 19, 2002 he not only tore his left rotator cuff, but also suffered a partial tear in his right rotator cuff that later became a complete tear.⁸

On June 3, 2005 appellant underwent a magnetic resonance imaging (MRI) scan of his right shoulder which showed a complete tear of the rotator cuff tendon and moderate-to-marked impingement secondary to degenerative changes in the right acromioclavicular joint.

On July 15, 2005 appellant underwent a right shoulder arthroscopy with debridement, subacromial decompression, and mini-open rotator cuff repair. The surgery was not authorized by OWCP.

Appellant submitted an attending physician's report (Form CA-20), completed on July 18, 2005, in which Dr. Thomas Rivers, an attending Board-certified orthopedic surgeon, noted under history of injury, "[Right] shoulder injury on May 16, 2005. Falling backwards and tried to break fall -- rotator cuff tear." With regard to causal relationship to the December 19, 2002 work injury, he checked a box marked "Yes" and indicated, "Possibly due to length of time difficult to determine appears to be old injury (tear)...." Dr. Rivers noted that the period of total disability was from July 15 to August 26, 2005.

In an August 28, 2005 letter to OWCP, appellant again contended that he also sustained injury to his right shoulder during the December 19, 2002 training exercise.

On September 11, 2007 appellant appeared for an examination by Dr. John W. Ellis, an attending Board-certified occupational medicine physician. Dr. Ellis noted that appellant reported that he was having no difficulty with his right shoulder when he injured his left shoulder on December 19, 2002, and that, as he favored his left shoulder, he began to notice some symptoms in his right shoulder. He discussed appellant's data entry job and noted that he was unable to continue working after May 5, 2005 because of his left shoulder condition. Dr. Ellis noted that on May 16, 2005 appellant was "sitting down on the beach and he simply put his arms behind him, put his hands down in the sand and he had a sudden severe pain in his right shoulder." He diagnosed internal derangement and rotator cuff tear of the left shoulder and left brachial and axillary plexus impingement. Dr. Ellis indicated that appellant's December 19, 2002 work injury caused him to be totally disabled since May 5, 2005.

On July 7, 2009 OWCP expanded the accepted conditions related to the December 19, 2002 work injury to include other affections of right shoulder region, not elsewhere classified.⁹

In a decision dated August 1, 2011, OWCP denied appellant's recurrence claim beginning May 5, 2005 due to his December 19, 2002 work injury. It indicated that the medical

⁸ On June 30, 2005 appellant filed a claim for compensation (Form CA-7) alleging disability from "May 5, 2005 [to the] present" due to his December 19, 2002 work injury. On April 5, 2011 he filed a Form CA-7 alleging work-related disability continuing after June 30, 2005.

⁹ In a July 7, 2009 letter, OWCP advised appellant, without explanation, that his "recurrence has been accepted by this office." It produced a similar letter dated October 21, 2010. However, it does not appear that appellant received disability compensation for any additional period for which he had not already been compensated.

evidence of record did not support that he had work-related disability for the claimed period. OWCP noted, “You are not entitled to wage-loss/compensation due to your termination from civil service.”¹⁰

Appellant disagreed with OWCP’s August 1, 2011 decision and requested an oral hearing with a representative of OWCP’s Branch of Hearings and Review. Prior to the hearing being held, OWCP’s hearing representative issued a November 7, 2011 decision setting aside OWCP’s August 1, 2011 decision and remanding the case to OWCP. He indicated that OWCP failed to adequately explain why appellant had not established work-related recurrence of disability beginning May 5, 2005. The hearing representative also noted that OWCP had not adequately explained why it accepted appellant’s claim for the consequential condition of other affections of right shoulder region, not elsewhere classified. The case was remanded to OWCP for consideration of these matters and the issuance of a *de novo* decision regarding appellant’s recurrence of disability claim.¹¹

By decision dated January 7, 2013, OWCP denied appellant’s claim for a recurrence of disability beginning May 5, 2005 due to his December 19, 2002 work injury. It found that appellant failed to submit rationalized medical evidence establishing his claim for recurrence of disability. OWCP discussed the reports of attending physicians which found disability on and after May 5, 2005, including those of Dr. Rivers and Dr. Ellis, and found that they did not contain adequate explanation of their conclusions on work-related disability.

In May 2013, OWCP referred appellant for a second opinion examination with Dr. James Hood, a Board-certified orthopedic surgeon. It requested that Dr. Hood indicate whether appellant’s diagnosed conditions were related to the December 19, 2002 work injury either by direct cause, aggravation, precipitation, or acceleration. OWCP also asked Dr. Hood to provide an opinion regarding whether appellant sustained work-related disability on or after May 5, 2005. It provided Dr. Hood a current statement of accepted facts.

In a report dated June 12, 2013, Dr. Hood discussed appellant’s medical history and reported the findings of the physical examination he conducted on that date. He detailed the circumstances of appellant’s December 19, 2002 work injury and his claim that he sustained a recurrence of disability due to that injury on May 5, 2005. Dr. Hood noted that appellant had 5/5 strength in the muscle groups of his upper extremities and provided range of motion findings for both shoulders. In response to a question regarding whether appellant’s medical condition was related to the factors described in the statement of accepted facts, Dr. Hood noted, “The diagnosed condition in the left shoulder would be related to an aggravation of preexisting degenerative rotator cuff disease of the left shoulder. I find no valid information that would document a relationship between his employment and the right shoulder.” He also indicated that “the aggravation to the left shoulder is permanent and will not cease.” Dr. Hood noted that appellant would have had work restrictions from May 5, 2005 to July 1, 2010, including no

¹⁰ It is unclear from the record why there was a delay between appellant’s filing of his disability claim and OWCP’s issuance of its August 1, 2011 decision.

¹¹ The hearing representative noted that appellant’s termination from the employing establishment was not a valid reason for denying disability compensation.

overhead lifting with the left shoulder and no overhead repetitive work, due to his work-related left shoulder condition.

In a letter dated November 22, 2013, OWCP informed appellant that it proposed to rescind its acceptance of his claim for right shoulder injury due to his December 19, 2002 work injury. It advised that it improperly accepted that he had sustained the condition of other affections of right shoulder region, not elsewhere classified. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed rescission action.

Appellant submitted a March 3, 2014 medical report detailing the evaluation of his bilateral shoulder condition and reports of sessions with his attending chiropractor.

In a decision dated January 29, 2015, OWCP rescinded its acceptance of appellant's claim for the condition of other affections of right shoulder region, not elsewhere classified. It explained the justification for its rescission determination by noting that appellant failed to submit rationalized medical evidence establishing a right shoulder injury due to the December 19, 2002 work injury, that the June 12, 2013 report of Dr. Hood showed that he had not sustained such a work-related condition, and that the description of his fall while swimming during vacation on May 16, 2005 suggested a nonwork-related cause for his right shoulder injury.¹²

In letters to OWCP dated January 19, February 25, and April 19, 2016, appellant's then counsel argued that the June 12, 2013 opinion of Dr. Hood, OWCP's referral physician, showed that appellant sustained a recurrence of disability on or after May 5, 2005 due to his December 19, 2002 work injury. He requested that OWCP issue a decision on this matter.

By decision dated May 25, 2016, OWCP found that appellant had not met his burden of proof to establish a recurrence of disability on or after May 5, 2005 due to his December 19, 2002 work injury.¹³ It found that appellant failed to submit sufficient medical evidence to establish a material worsening of his December 19, 2002 left shoulder injury such that he had disability from work on or after May 5, 2005.¹⁴ OWCP discussed its January 29, 2015 decision rescinding its acceptance of appellant's claim for the condition of other affections of right shoulder region, not elsewhere classified, and noted that appellant failed to submit medical evidence establishing that he sustained a right shoulder condition related to his December 19, 2002 work injury.

¹² On March 5, 2015 appellant requested authorization from OWCP to change his treating physician and, in an April 16, 2015 decision, OWCP denied his request. In an August 19, 2015 decision, the Board affirmed OWCP's April 16, 2015 decision.

¹³ The record contains another May 25, 2016 document which contains essentially the same language as OWCP's May 25, 2016 decision. This appears to be a variant draft of OWCP's May 25, 2016 decision.

¹⁴ In rendering its decision, OWCP discussed the June 12, 2013 report of Dr. Hood.

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹⁵ This burden 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 the employment injury and supports that conclusion with sound medical rationale.¹⁶ Where no such rationale is present, medical evidence is of diminished probative value.¹⁷

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁸

ANALYSIS

OWCP accepted that during training for an immigration inspector position on December 19, 2002 appellant sustained a traumatic injury which caused other affections of the left shoulder region, not elsewhere classified, impingement syndrome of the left shoulder, and left rotator cuff tear. On December 21, 2002 appellant was unable support his right arm with his left arm during firearms qualification testing required to work as an immigration inspector. He did not qualify and was terminated from his position with the employing establishment effective December 26, 2002. On April 4, 2004 appellant returned to full-time work with the employing establishment's Citizenship and Immigration Service as a center adjudication officer. He stopped work on May 5, 2005 when his one-year term appointment expired and was not renewed. In July 2009, OWCP expanded the accepted conditions caused by the December 19, 2002 work injury to include other affections of the right shoulder region, not elsewhere classified.¹⁹ In a January 29, 2015 decision, it rescinded its acceptance of this right shoulder condition. Appellant alleged that he sustained a recurrence of disability beginning May 5, 2005 due to his December 19, 2002 work injury and, in January 7, 2013 and May 25, 2016 decisions, OWCP denied his recurrence of disability claim due to his failure to submit adequate medical evidence in support thereof.

¹⁵ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986). Under 20 C.F.R. § 10.5(x), a recurrence of disability is defined, in part, as “an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”

¹⁶ *L.F.*, Docket No. 15-1069 (issued August 12, 2015); *Mary S. Brock*, 40 ECAB 461, 471-72 (1989).

¹⁷ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

¹⁸ *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

¹⁹ On August 26, 2003 appellant underwent OWCP-authorized left shoulder arthroscopy with limited joint debridement and open rotator cuff repair.

The Board finds the case is not in posture for decision regarding whether appellant met his burden of proof to establish a recurrence of disability beginning May 5, 2005 due to his December 19, 2002 work injury.

As noted above, the case is presently accepted for the left shoulder conditions of other affections of the left shoulder region, not elsewhere classified, impingement syndrome of the left shoulder, and left rotator cuff tear. In its May 25, 2016 decision denying appellant's recurrence of disability claim, OWCP discussed its January 29, 2015 decision rescinding its acceptance of appellant's claim for the condition of other affections of the right shoulder region, not elsewhere classified, and explained that appellant's right shoulder condition was unrelated to his December 19, 2002 work injury. Appellant did not request reconsideration of the January 29, 2015 decision or appeal it to the Board. Since the issuance of this decision, appellant has not submitted any medical evidence showing that he sustained a right shoulder condition related to his December 19, 2002 work injury.²⁰

The Board notes that OWCP has not provided an informed determination regarding whether appellant sustained a recurrence of disability beginning May 5, 2005 due to a worsening of his accepted left shoulder conditions caused by the December 19, 2002 work injury. In May 2013, OWCP referred appellant for a second opinion examination to Dr. Hood, a Board-certified orthopedic surgeon. It asked Dr. Hood to indicate whether appellant's medical condition was related to the December 19, 2002 work injury and to provide an opinion regarding whether he sustained work-related disability on or after May 5, 2005. In his June 12, 2013 report, Dr. Hood noted, in response to a question from OWCP as to whether appellant's medical condition was related to the December 19, 2002 work injury, that the diagnosed condition in the left shoulder would be related to an aggravation of preexisting degenerative rotator cuff disease of the left shoulder. He also indicated that the aggravation to the left shoulder was permanent and noted that appellant would have had work restrictions from May 5, 2005 to July 1, 2010 due to his work-related left shoulder condition.

In its May 25, 2016 decision denying appellant's recurrence of disability claim, OWCP mentioned Dr. Hood's work restrictions necessitated by the left shoulder conditions sustained on December 19, 2002. Nevertheless, it denied appellant's claim without discussing whether these work restrictions would have rendered appellant disabled on or after May 5, 2005. The record does not contain a position description of the duties and physical requirements of the center adjudication officer position that appellant held. In the absence of this information, the Board is unable to render an informed decision regarding whether the work restrictions recommended by Dr. Hood would disable appellant from the center adjudication officer position.²¹

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

²⁰ See *supra* note 18.

²¹ See generally *K.W.*, Docket No. 15-1535 (issued September 23, 2016); *J.S.*, Docket No. 15-1006 (issued October 9, 2015) (Board remanded case to OWCP for further development because the record was inadequate to render an informed decision).

justice is done.²² Therefore, in order to render an informed decision regarding appellant's claim for a work-related recurrence of disability beginning May 5, 2005, the case must be remanded to OWCP to obtain information about the duties and physical requirements of the center adjudication officer position, appellant held immediately prior to May 5, 2005 when his termed appointment ended and to consider whether appellant was disabled from either of these positions on or after May 5, 2005 due to his December 19, 2002 work injury.

Therefore, the case is remanded to OWCP for further development of the evidence to be following by a *de novo* decision regarding appellant's claim for a recurrence of disability beginning May 5, 2005 due to his December 19, 2002 work injury.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish a recurrence of disability on or after May 5, 2005 due to his December 19, 2002 work injury. The case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 6, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²² *D.B.*, Docket No. 16-0904 (issued May 2, 2017).