

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-0852
Issued: November 1, 2017**

Appearances:
*Frankie Sanders, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 21, 2016 appellant, through his representative, filed a timely appeal from a February 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after the February 10, 2016 decision was issued. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish partial disability beginning January 9, 2014, causally related to his employment-related conditions.

FACTUAL HISTORY

On January 3, 2014 appellant, then a 56-year-old mail processing/distribution clerk, filed an occupational disease claim (Form CA-2) alleging a bilateral shoulder condition which arose on or about August 8, 2013. He explained that his “repetitive duties” aggravated a prior bilateral shoulder injury.⁴

By decision dated June 9, 2014, OWCP denied appellant’s claim for compensation for the period January 9, 2014 and continuing. It explained that the medical evidence of record did not support time off from work due to the work-related conditions.

On July 8 and 11, 2014 appellant requested reconsideration of the June 9, 2014 decision and submitted additional evidence.

By decision dated August 7, 2014, OWCP denied modification of the June 9, 2014 decision.

On October 16, 2014 appellant requested reconsideration.

In February 2015 OWCP determined that a second opinion examination was required to determine the extent of appellant’s disability with regard to his accepted conditions and an opinion with regard to his ability to work since January 9, 2014. It requested that the second opinion physician provide an explanation with regard to whether appellant was capable of working an eight-hour day, and if not, the number of hours he was capable of working with restrictions.

By letter dated April 20, 2015, OWCP referred appellant for a second opinion examination, along with a statement of accepted facts, a set of questions and the medical record to Dr. William Nemeth, a Board-certified orthopedic surgeon.

By decision dated May 6, 2015, OWCP affirmed as modified the August 7, 2014 decision. It vacated the decision, in part, with regard to appellant’s entitlement to compensation. OWCP found that appellant was entitled to compensation for partial disability in the amount of \$2,003.87 for intermittent doctor appointments, diagnostic testing, and physical therapy for January 9, 13, 14, 16, 21, 23, 25, 27, 30; February 3, 4, 7, 10, 13, 14, 18, 20, 21, 24, 27, 28; and March 3, 2014. However, it found that the evidence of record was insufficient to support that appellant could only work four hours a day with restrictions.

Following its May 6, 2015 merit decision, OWCP received additional medical evidence.

⁴ Appellant has a previously accepted occupational disease claim, OWCP File No. xxxxxx185, for bilateral shoulder/upper arm acromioclavicular sprain, which arose on or about October 7, 2008. He underwent a September 8, 2009 right shoulder arthroscopic procedure, which OWCP approved. In June 2011 appellant received a schedule award for 12 percent permanent impairment of the right upper extremity in this claim.

In an April 29, 2015 report, received May 19, 2015, Dr. Kevin A. Williams, a Board-certified orthopedic surgeon, noted that appellant was seen for evaluation for his current accepted shoulder, right arm, and neck conditions. He advised that appellant was on a work restriction and was “to remain on a work restriction of four (4) hours a day for work, with limited use of his arms, and shoulders.” Dr. Williams indicated that appellant was incapacitated and unable to work more than four hours a day.

Dr. Key provided a June 5, 2015 report, received on June 22, 2015, in which he noted that appellant was working a four-hour day because of the pain in the shoulder and neck for the past several months. He reviewed appellant’s records and advised that he had new pain in the right forearm on the muscle mass of the brahioradialis in addition to pain near the elbow and arm. Dr. Key advised that appellant had appealed the ruling of not paying for the extra four hours. He explained that when appellant tried to increase his hours, he had to once again reduce them because of pain the following day so he is “up to no lifting over five pounds and no working above the shoulders, no shoulder level with hands and arms.”

In a June 8, 2015 report, received on July 13, 2015, Dr. Reginald J. Newsome, a Board-certified anesthesiologist, noted that appellant had complaints of neck pain with radiation into his shoulders. He advised that appellant related that the pain had been present for greater than 33 years, but he had a recent work injury in October 2008. Appellant reported that his pain worsened with reaching, pulling, and lifting, and he described an associated numbness into his shoulders. Dr. Newsome recommended cervical epidural steroid injections, a right shoulder intra-articular joint injection, and suprascapular nerve block.

In a June 18, 2015 report, received on July 20, 2015, Dr. Nemeth, the second opinion physician, noted appellant’s history of injury and treatment. He examined appellant and provided objective findings. Dr. Nemeth diagnosed chronic neck pain, likely due to spondylosis as well as rotator cuff tendinitis with impingement of both shoulders. Regarding whether any of appellant’s accepted conditions had resolved, he opined that they had not resolved and appellant was still symptomatic from the chronic inflammatory conditions, which were ongoing permanent inflammatory conditions that required ongoing care. Dr. Nemeth explained that appellant had use-related inflammatory conditions with tendinitis of both shoulders and mild spondylosis of disc disease of the neck. He opined that with restricted duty, appellant was capable of working eight hours a day as of December 18, 2013. Dr. Nemeth provided permanent restrictions which included a maximum lifting restriction of no lifting over 10 pounds, no overhead work, and a 15-minute break every two hours for eight hour shifts. He also indicated that appellant should have a pushing and pulling restriction limited to 10 pounds.

In August 28, 2015 reports, Dr. Newsom performed trigger point injections, epidural steroid injections, and a diagnostic evaluation of the bilateral levator scapulae, bilateral rhomboids, and bilateral trapezius.

On October 23, 2015 appellant again requested reconsideration.

In an October 21, 2015 report, Dr. Key noted that he was offering an explanation with regard to appellant’s claim for wage-loss compensation. He explained that appellant’s duties included lifting, reaching over the service counter, repetitive line up of data into a computer terminal, fine manipulation of selling and counting stamps and money, and other duties as

assigned. Dr. Key indicated that appellant began experiencing pain in his shoulders as a result of the repetitious work in December 2012. He noted that the issue was whether appellant could work more than four hours a day, as he was restricted to no more than four hours of repetitive work. Dr. Key explained that appellant had a cervical spine magnetic resonance imaging (MRI) scan on June 5, 2015 which revealed a central disc herniation at C5-6 measuring three millimeters, with an approximately three millimeter perineural cyst involving the left C6 nerve. He advised that the June 5, 2015 MRI scan of the right shoulder revealed an undersurface partial tear of the supraspinatus tendon and a sublabral recess versus small labral tear. Dr. Key also noted a technically successful right shoulder arthrogram. A right elbow MRI scan revealed tendinitis at the common flexor tendon insertion. Dr. Key explained that appellant's duties required the repetitive use of his neck, hands, and shoulders while performing his normal and customary duties, all of which were repetitive.

Dr. Key explained that his conditions had not improved with his continuing to work and thus appellant was limited to working four hours per day. He explained that the repetitive and constant use of his hands, neck, and shoulders to perform his duties resulted in a decreased range of motion, occasional swelling, and increased symptomatology of pain. Dr. Key indicated that performing these duties for periods of greater than four hours only exacerbated his accepted medical condition. He noted that appellant's claim was denied because it was alleged that he had not provided a well-reasoned opinion. Dr. Key opined that he "did not know any other way of putting it." He explained that appellant could not perform the repetitive duties involving his neck, hands, and shoulders for more than four hours without causing greater harm to his physical wellbeing. Dr. Key explained that the repetitive use of his hands, neck, and shoulders to service customers across the window, and to perform his duties, resulted in an exacerbation of his accepted medical condition. He opined that appellant was restricted to four hours of work using his neck, hands and shoulders related to his duties as window clerk. Dr. Key continued to submit reports dated October 28 and November 25, 2015 advising that appellant could only work four hours a day with restrictions of no repetitive motions and no lifting above the shoulders.

On December 2, 2015 OWCP received a corrected copy of Dr. Key's October 21, 2015 report. Dr. Key noted that it was generated under a different claim number. The contents of the report were the same as the prior report.

OWCP also received additional evidence including physical therapy notes, CA-17's, a right shoulder MRI scan, a cervical spine MRI scan, an arthrogram, hospital notes, chart notes, request for durable medical equipment, a muscle strength test, a request for diagnostic test, and an MRI scan of the right elbow.

By decision dated February 10, 2016, OWCP denied modification of the prior decision. It listed the evidence reviewed in support of appellant's reconsideration request, which included physical therapy notes, CA-17s, an MRI scan of the right shoulder, an MRI scan of the cervical, arthrogram, hospital notes, chart notes, appellant's statement requesting reconsideration, a request for durable medical equipment, a muscle strength test, a request for diagnostic test, an MRI scan of the right elbow, and Dr. Key's October 21, 2015 report. OWCP found that although appellant submitted new evidence, there continued to be a lack of rationalized medical evidence to support disability due to the accepted work injury for the period claimed. Consequently, it denied modification of its prior decisions.

LEGAL PRECEDENT

A claimant has the burden of proof to establish the essential elements of his or her claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.⁵ Compensation for wage loss due to disability is available for periods during which an employee's work-related medical conditions prevent him or her from earning the wages earned before the work-related injury.⁶ The claimant must submit medical evidence showing that the condition claimed is disabling.⁷ The evidence submitted must be reliable, probative, and substantial.⁸

A physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.⁹ Subjective complaints of pain are insufficient, in and of themselves, to support payment of continuing compensation.¹⁰ Likewise, medical limitations based solely on the fear of a possible future injury are also insufficient to support payment of continuing compensation.¹¹

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issue(s) in the case.¹³

ANALYSIS

As the Board's decisions are final with regard to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.¹⁴ In the February 10, 2016 decision, OWCP listed the evidence reviewed in support of appellant's request for reconsideration, which included Dr. Key's October 21, 2015 medical report. However, OWCP did not identify or address several

⁵ 20 C.F.R. § 10.115(e); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996).

⁶ 20 C.F.R. § 10.500(a).

⁷ *Id.* at § 10.115(f).

⁸ *Id.* at § 10.115.

⁹ *Id.* at § 10.501(a)(2).

¹⁰ *Id.* at § 10.501(a)(3).

¹¹ *Id.*

¹² *William J. Cantrell*, 34 ECAB 1223 (1983).

¹³ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

¹⁴ 20 C.F.R. § 501.6(d); see *William A. Couch*, 41 ECAB 548, 553 (1990).

relevant medical reports which addressed the claimed period of disability and were received subsequent to its May 6, 2015 merit decision, but prior to the issuance of the February 10, 2016 decision. They include the June 18, 2015 report from Dr. Nemeth, the April 29, 2015 report from the second opinion physician, Dr. Williams, a June 5, 2015 report from Dr. Key, and a June 8, 2015 report from Dr. Newsome.

Accordingly, the Board finds that OWCP failed to consider relevant evidence it received prior to the issuance of the February 10, 2016 decision denying modification. Whether OWCP receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.¹⁵ As OWCP failed to address all relevant evidence before it at the time, the case is remanded for a proper review of the evidence and issuance of an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for decision.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the February 10, 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: November 1, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ *Willard McKennon*, 51 ECAB 145 (1999).

¹⁶ As the case is not in posture for decision, the Board will not address appellant's contentions on appeal.