United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 17-0955**
	)	**Issued: October 23, 2017**
ENVIRONMENTAL PROTECTION AGENCY, AIR ENFORCEMENT & COMPLIANCE ASSURANCE BRANCH, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 25, 2017 appellant filed a timely appeal from a September 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's September 27, 2016 decision was March 26, 2017. Since using March 30, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 25, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence on appeal after OWCP's September 27, 2016 decision was issued. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board may not consider this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt* 57 ECAB 126 (2005).

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing March 13, 2015, causally related to her accepted April 23, 2008 employment injuries.

FACTUAL HISTORY

OWCP accepted that, on April 23, 2008, appellant then a 31-year-old information management specialist, lifted boxes of documents, causing a traumatic right trapezius muscle strain, right shoulder and upper arm sprain, thoracic sprain, right lateral epicondylitis,[4] aggravation of displaced cervical disc without myelopathy, and cervical stenosis.[5] Appellant stopped work on May 1, 2008.

OWCP paid appellant ongoing wage-loss compensation for temporary total disability commencing June 11, 2008. Appellant remained under medical care.[6]

In January 5 and 20, 2009 reports, Dr. Vikram Prabhu, an attending Board-certified neurosurgeon, related appellant's complaints of neck pain with radiation into the left upper extremity. He found no focal neurologic deficits on examination. Dr. Prabhu recommended evaluation for a C5-6 discectomy. He held appellant off work due to cervical radiculitis and displacement of cervical intervertebral disc.[7]

On June 18, 2009 Dr. Daniel Mass, an attending physician Board-certified in orthopedic surgery and hand surgery, diagnosed right scapular destabilization and possible long thoracic nerve palsy. He prescribed physical therapy.[8] On August 18, 2009 Dr. Mass diagnosed brachial plexus and right shoulder pain. He recommended surgery to stabilize appellant's right scapula if strengthening exercises were ineffective. On September 29, 2009 Dr. Mass noted continuing symptoms and recommended surgery.

[4] On April 29, 2008 an urgent care clinic physician whose signature is illegible diagnosed a right trapezius sprain. In a May 5, 2008 report, Dr. Helen Maciorowski, an attending Board-certified internist, diagnosed right lateral epicondylitis.

[5] By decision dated September 5, 2008, OWCP initially denied the claim, finding that causal relationship had not been established. Appellant requested reconsideration on February 11, 2009 and submitted additional evidence. Following additional development, OWCP accepted the claim on April 16, 2009. Appellant filed a duplicate claim, assigned File No. xxxxxx282, accepted for a right shoulder and upper arm sprain, aggravation of displaced cervical disc without myelopathy, and cervical stenosis. OWCP doubled the two claims, effective September 1, 2009, with this claim, File No. xxxxxx632, serving as the master file.

[6] A September 16, 2008 cervical magnetic resonance imaging (MRI) scan demonstrated C5-6 and C6-7 disc herniations, with a small focal disc protrusion at C5-6.

[7] A March 5, 2009 MRI scan of the right upper extremity showed mild supraspinatus tendinosis and subacromial/subdeltoid bursitis. June 11, 2009 electromyography and nerve conduction velocity studies of the right upper extremity were normal.

[8] Appellant underwent physical therapy from June through October 2009.

An October 21, 2009 functional capacity evaluation (FCE) demonstrated appellant's ability to perform sedentary work with limitations on upper extremity activities. Appellant was unable to perform critical functions of her date-of-injury position, including lifting, carrying, reaching above the shoulder, handling, fingering, and push/pull. She would require rest breaks of 10 minutes each hour, and an ergonomic chair and workstation.

On October 28, 2009 OWCP obtained a second opinion from Dr. David H. Trotter, a Board-certified orthopedic surgeon, regarding the nature and extent of the accepted conditions. Dr. Trotter reviewed a statement of accepted facts (SOAF) and the medical evidence of record. On examination, he found tenderness to palpation of the cervical paraspinal musculature, and full motion of the cervical spine and upper extremities. Dr. Trotter diagnosed a resolved aggravation of cervical spondylosis, with no objective abnormality of the spine, shoulders, or elbows attributable to the accepted April 23, 2008 employment injuries. He found appellant able to return to full-time work with a permanent restriction against repetitive lifting.

In a November 3, 2009 report, Dr. Prabhu noted that appellant was scheduled for a right pectoralis transfer procedure for brachial plexus decompression. On November 10, 2009 he restricted appellant from lifting more than 20 pounds, especially overhead. In a November 18, 2009 report, Dr. Prabhu diagnosed cervical spondylosis and a C5-6 disc herniation. He characterized appellant's neck condition as permanent.

Appellant returned to limited-duty work on November 30, 2009.

OWCP found a conflict between Dr. Mass, for appellant, and Dr. Trotter, for the government, regarding the need for right shoulder surgery. To resolve the conflict, it selected Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, to provide an impartial examination and opinion. Dr. Dzwinyk provided a May 27, 2010 report reviewing the medical evidence of record and a SOAF. He noted that appellant had not returned to full duty following the accepted April 23, 2008 employment injuries. On examination, Dr. Dzwinyk observed full motion of the cervical spine, a mild internal rotation deficit of the right shoulder, normal muscle strength in the shoulder girdle and upper extremities, and no scapular winging. He opined that the accepted employment injuries had ceased without residuals. Dr. Dzwinyk explained that the requested pectoralis major transfer surgery was unnecessary as appellant had no clinical or electrodiagnostic findings of long thoracic nerve injury. He commented that appellant did not require work restrictions due to the accepted injuries, but may require job modification due to nonindustrial factors.

By decision dated August 5, 2010, OWCP denied appellant's request for a pectoralis tendon transfer, based on Dr. Dzwinyk's opinion that the procedure was medically unnecessary.

In a November 22, 2010 letter, Dr. Mass opined that the accepted occupational injury caused "permanent injury to the long thoracic nerve," leading to a winged right scapula. Appellant used her arm abnormally at work and in physical therapy, causing elbow and wrist pain diagnosed as a triangular fibrocartilage tear for which she underwent surgery. As her right shoulder had also improved, Dr. Mass released appellant to light duty as of December 6, 2010.

In a March 23, 2011 letter, OWCP notified appellant that expansion of the claim to include consequential right wrist and elbow conditions required submission of a comprehensive report from her treating physician supporting causal relationship. Appellant did not submit additional medical evidence at that time.

A March 5, 2015 "essential job functions" description for appellant's Management Analyst job listed clerical tasks including writing, data entry, date stamping and logging mail, placing mail and documents in staff mailboxes, organizing documents, and "carrying light documents." The description noted that "[a]ssistance should be requested for documents which may arrive in boxes."

In March 23 and 26, 2015 reports, Dr. Thomas Albert, an attending Board-certified internist, opined that appellant was medically unable to perform "[r]epetitive motion, typing, writing, stamping, sorting, logging, [and] mail distribution" as described in the March 5, 2015 position description. He noted that she underwent a failed right shoulder surgery, and that her duties were "likely to aggravate and worsen" her conditions.

Appellant stopped work on March 12, 2015 and did not return. On April 23, 2015 she filed a claim for ongoing wage-loss compensation (Form CA-7) commencing March 13, 2015. OWCP developed appellant's claim for wage-loss compensation as a claim for recurrence of disability while on light duty.

In May 1 and 19, 2015 letters, OWCP notified appellant of the additional medical evidence needed to establish her claim, including reports of any medical treatment rendered from November 22, 2010 through March 23, 2015 establishing a continuing work-related condition. It afforded her 30 days to submit such evidence.

In response, appellant submitted a June 20, 2013 report from Dr. Archit Patel, an attending Board-certified orthopedic surgeon, diagnosing right scapular winging, brachial neuritis or radiculitis not otherwise specified, and right forearm pain. He released her to modified duty as of June 21, 2013. Dr. Patel noted that appellant would require an ergonomic workstation and voice recognition software.

On September 3, 2013 Dr. Prabhu diagnosed cervical spondylosis and prescribed physical therapy. He referred appellant to a pain clinic for consideration of injections. In a September 4, 2013 letter, Dr. Prabhu explained that he was not certain that she had a true cervical radiculopathy "despite the MRI [scan] findings."

In a November 6, 2013 report, Dr. Albert opined that appellant was disabled from performing the management analyst position as she was unable to type, write, or perform repetitive upper extremity motion. He noted that right shoulder surgery, medication, and physical therapy failed to relieve her symptoms.

Dr. Albert submitted a June 22, 2015 report summarizing appellant's treatment. He noted that she underwent a pectoralis tendon transfer and right wrist surgery in 2010 which improved the range of right shoulder and wrist motion. However, appellant's work duties "still caused significant flare up and time off work." Dr. Albert opined that, based on clinical findings and medical history, her present "right neck, upper back, shoulder, elbow, and wrist [were] all related

to the injury [appellant] sustained originally. These ha[d] never fully resolved" and would require continuing treatment.

By decision dated July 23, 2015, OWCP denied appellant's claim for recurrence of disability finding that the medical evidence of record was insufficient to establish that the accepted conditions disabled her from work for the claimed period. It noted that Dr. Dzwinyk opined on May 27, 2010 that the accepted injuries had resolved with no residuals. OWCP found that the additional medical reports submitted contained insufficient medical rationale to overcome the special weight accorded to Dr. Dzwinyk's opinion.

On July 14, 2016 appellant requested reconsideration. She contended that the medical evidence of record established that the accepted neck, back, and right arm injuries remained active and disabling. Appellant submitted a June 16, 2016 report from Dr. Michael Rock, an attending Board-certified anesthesiologist. Dr. Rock opined that the accepted injuries, right shoulder surgery, and repetitive lifting, reaching, and carrying at work caused nerve damage to the right shoulder and the long thoracic nerve, resulting in right scapular winging, bursitis and tendinosis of the right shoulder, bilateral scapular winging, right-sided neuropathic pain syndrome, complex regional pain syndrome, radiculopathy, a tear of the triangular fibrocartilage complex of the right wrist, myelopathy, and neuropathy. He explained that any use of the right upper extremity, including light-duty work, created "sustained currents" of neurochemical activation which produced pain signals.

By decision dated September 27, 2016, OWCP denied modification, finding that the medical evidence of record was insufficiently rationalized to establish appellant's claimed recurrence of disability.[9]

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 proof to establish that there was no medically appropriate light duty available for the claimed period.[12]

[9] OWCP advised that, because Dr. Dzwinyk did not address all of appellant's accepted conditions and since his report was over six years old, it was not used in considering whether she established a recurrence of disability beginning March 13, 2015.

[10] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

[11] *J.F.*, 58 ECAB 124 (2006).

[12] *Id*.

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 of proof to establish by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and to show that 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

OWCP accepted that on April 23, 2008, appellant sustained a right trapezius strain, right shoulder and upper arm sprain, thoracic sprain, right lateral epicondylitis, aggravation of displaced cervical disc without myelopathy, and cervical stenosis.

Following a period of total disability, appellant returned to modified duty on November 30, 2009 within work limitations obtained through the October 21, 2009 FCE. Dr. Dzwinyk, a Board-certified orthopedic surgeon and impartial medical examiner with regard to requested surgery, explained on May 27, 2010 that the accepted injuries had resolved and that there was no need for surgery.

Dr. Patel, an attending Board-certified orthopedic surgeon, restricted appellant to modified duty as of June 21, 2013, directing the use of voice recognition software as she was unable to use a computer keyboard. Dr. Albert, an attending Board-certified internist, found her unable to perform the essential functions of a management analyst as of November 6, 2013, as she could not write, stamp mail, use a keyboard, or distribute mail.

A March 5, 2015 job description for appellant's management analyst position noted job modifications. Appellant continued to require assistance with lifting, and was to carry only "light documents." She stopped work on March 12, 2015 and did not return. Appellant claimed a recurrence of disability commencing March 13, 2015. There is no evidence that the physical requirements of her light-duty assignment were altered such that they exceeded her physical limitations.

In support of her recurrence claim, appellant submitted reports dated from March 23 to June 22, 2015 from Dr. Albert, opining that she was medically unable to perform the repetitive upper extremity motions needed to stamp and sort mail, keyboard, and write. Dr. Albert

[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).

contended that the accepted conditions had not resolved. However, he did not specify which clinical findings and test results supported that the accepted conditions had worsened such that appellant was completely unable to perform the modified management analyst position. OWCP requested such an explanation in its May 1 and 19, 2015 letters. As Dr. Albert did not provide such rationale, his opinion is insufficient to meet appellant's burden of proof in establishing total disability from work commencing March 13, 2015.[16]

Appellant also provided a June 16, 2016 report from Dr. Rock, an attending Board-certified anesthesiologist, who variously attributed her conditions to the accepted injuries, right shoulder surgery, work duties, or any physical movement sufficient to produce neurochemical pain signals. The equivocal nature of Dr. Rock's rationale reduces the probative value of his opinion.[17]

The Board therefore finds that the medical evidence of record is insufficient to establish that the accepted right upper extremity, cervical, and thoracic conditions worsened as of March 12, 2015 such that appellant was no longer able to perform her light-duty position.

On appeal appellant contends that she performed full-duty work from December 2010 through March 12, 2015. She acknowledged that Dr. Rock's reasoning was inconsistent, but asserted that the remainder of the medical record established causal relationship. As set forth above the medical evidence submitted is insufficient to establish appellant's claim.

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 met her burden of proof to establish a recurrence of total disability commencing March 13, 2015, causally related to accepted April 23, 2008 employment injuries.

[16] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[17] *See Steven S. Saleh*, 55 ECAB 169 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2016 is affirmed.

Issued: October 23, 2017
Washington, DC

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

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

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