

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

J.S., Appellant)	
)	
and)	Docket No. 17-1401
)	Issued: March 23, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Tully, NY, Employer)	
)	

Appearances:
Kimberly A. Slimbaugh, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2017 appellant, through counsel, filed a timely appeal from a December 20, 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.

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.*

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability from October 1, 2015 to March 21, 2016 due to her accepted employment injuries.

FACTUAL HISTORY

On June 2, 2015 appellant, then a 58-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging left trapezius muscle spasm, left subacromial impingement, and left rotator cuff tear resulting from the performance of her federal duties. She attributed her conditions to lifting heavy mail and reaching out the window of her postal vehicle to place the mail in mailboxes that were hard to reach due to snowbanks. Appellant first became aware of her conditions and their relationship to her federal employment on February 3, 2015. She stopped work on February 27, 2015 and returned to regular-duty work effective April 8, 2015.

On September 11, 2015 OWCP accepted appellant's claim for left shoulder impingement.

In a September 30, 2015 medical report, Dr. Bradley S. Raphael, an attending orthopedic surgeon, noted a history that seven months ago appellant sustained a left shoulder injury at work. He discussed physical examination findings and diagnosed subacromial impingement. Dr. Raphael requested authorization to perform an arthroscopy of the left shoulder for subacromial decompression and debridement because appellant's symptoms had progressed and failed to respond to conservative measures. He advised that the incident described by her was a competent medical cause of her left shoulder injury. Dr. Raphael further advised that appellant's history and complaints were consistent with the history of the injury/illness. He concluded that she was temporarily totally disabled. Dr. Raphael noted that appellant was not working at that time and that she would remain off work until further notice.

On October 6, 2015 appellant filed a notice of recurrence of disability (Form CA-2a) commencing September 29, 2015. She claimed that she was limited in her ability to lift any weight with her left arm. Appellant described pain, swelling, tenderness, and weakness due to a torn rotator cuff. She noted her medical treatment and maintained that she remained symptomatic. Appellant asserted that her current condition was a continuation of her original injury. She related that she tried to continue working through her pain, however, her shoulder condition progressively worsened. On the claim form the employing establishment indicated that appellant had returned to full-time, regular-duty work on April 8, 2015. It reported that she stopped work on October 1, 2015.

Appellant filed a series of claims for compensation, CA-7 forms, for leave without pay (LWOP) for the period October 1 to 30, 2015.

In an October 13, 2015 duty status report (Form CA-17), Dr. Raphael listed February 27, 2015 as the date of injury. He reported examination findings and diagnosed left shoulder subacromial impingement due to injury. Dr. Raphael noted that appellant had not been advised to resume her regular work. In an October 22, 2015 work capacity evaluation (OWCP-5c), he advised that she was unable to perform her usual job or work eight hours a day with restrictions

due to left shoulder pain, progression of symptoms, and failure to improve with conservative measures.

On November 3, 2015 OWCP received a request for authorization to perform left shoulder arthroscopic surgery.

OWCP, by development letter dated November 4, 2015, advised appellant of the deficiencies of her recurrence claim and afforded her 30 days to submit additional medical and factual evidence.

Appellant filed a CA-7 form for leave buy back compensation for the period February 28 to April 7, 2016.

Appellant filed additional CA-7 forms for LWOP compensation from October 31 to December 25, 2015.

On November 23, 2015 appellant responded to OWCP's development questionnaire. She listed the physical requirements of her work duties and noted that her shoulder injury had affected her job duties. Appellant claimed that her symptoms had not responded to conservative measures. She also claimed that she had not sustained or incurred any other injuries or illness since her original injury. Appellant related that she was unable to participate in any activities outside of work due to her shoulder injury.

Appellant submitted additional reports dated October 26, November 16 and 18, and December 11, 2015 from Dr. Raphael. Dr. Raphael reiterated her history of injury, discussed examination findings, and restated his prior assessment of subacromial impingement as well as his prior opinion that her condition was work related and that she was temporarily totally disabled from work. He noted that appellant's mail carrier duties involved using her left hand to drive a route in her own personal vehicle and twisting, turning, pushing, and reaching to put mail into mailboxes, and handling up to 70 pounds of parcels. Dr. Raphael advised that her left shoulder condition had worsened due to her job duties and that she did not sustain a new injury. He related that appellant suffered a partial supraspinatus and infraspinatus tear due to continuous twisting, turning, and reaching with her left arm. Dr. Raphael maintained that it was well known and supported by evidenced-based data that repetitive use of the arms, especially at or above shoulder level, may cause fatigue and damage to the rotator cuff tendons; if the rate of tissue breakdown exceeded the rate of tissue healing, tendon degeneration and tear may occur. He noted that appellant's job duties required exactly that, repetitive use of the arms, *etc.* Dr. Raphael again recommended left shoulder surgery.

By decision dated January 14, 2016, OWCP denied appellant's recurrence claim because the medical evidence of record failed to establish that she was disabled due to a material change/worsening of her accepted work-related condition.

OWCP received additional reports dated December 16, 2015 and January 16 and 22, 2016 from Dr. Raphael in which he continued to diagnose subacromial impingement and to opine that appellant's condition was work related and that she was temporarily totally disabled from work. Dr. Raphael noted her repetitive work duties and related that repetitive motion can cause rotator cuff pathology and in extreme cases, a rotator cuff tear. He believed that appellant's pain was

caused and worsened by repetitive motion at work. Dr. Raphael continued to recommended left shoulder arthroscopic surgery.³ On January 15, 2016 he again prescribed physical therapy to treat her left shoulder condition.

Appellant filed additional CA-7 forms for LWOP for the period December 26, 2015 to April 7, 2016.

On February 26, 2016 appellant requested an oral hearing before an OWCP hearing representative regarding the January 14, 2016 decision.

OWCP received various medical records, which included a March 7, 2016 report from Dr. Eileen Stone, a Board-certified internist. Dr. Stone conducted a preoperative evaluation. She noted a history of the accepted work-related condition and appellant's medical treatment. Dr. Stone examined appellant and assessed sprain of the left rotator cuff capsule, initial encounter, essential (primary) hypertension, and encounter for other preprocedural examination.

Appellant underwent authorized left shoulder surgery. Hospital records included a March 22, 2016 operative report in which Dr. Raphael noted preoperative and postoperative diagnoses as left shoulder rotator cuff tear, left shoulder impingement, and left shoulder acromioclavicular joint arthrosis. He performed diagnostic arthroscopy, rotator cuff repair, subacromial decompression, extensive debridement, and distal clavicle excision of the left shoulder. In an April 11, 2016 form OWCP-5c, Dr. Raphael advised that appellant was unable to perform her usual job or work eight hours a day as she was status post left shoulder arthroscopic surgery. He determined that she had not reached maximum medical improvement. On April 13, 2016 Dr. Raphael reported that appellant was doing well three weeks status post left rotator cuff repair although she still had some stiffness and discomfort. He reiterated his prior left shoulder diagnosis and opinions on causal relationship and her disability status.

On April 15, 2016 OWCP informed appellant that her recurrence claim required further development due to a fall she sustained on January 15, 2015.

OWCP, by letter dated April 15, 2016, advised appellant that the medical evidence regarding her March 22, 2016 left shoulder surgery was insufficient to establish her recurrence claim. It afforded her 30 days to submit additional medical and factual evidence.

Dr. Raphael, in reports dated March 14 to July 5, 2016, discussed examination findings and again assessed subacromial impingement, as well as partial nontraumatic tear of the left rotator cuff. He restated his prior opinions on causal relationship and appellant's disability status. On April 13 and July 14, 2016 Dr. Raphael ordered physical therapy to treat her left shoulder conditions.

Reports and daily notes from appellant's physical therapists addressed her treatment from April 19 to June 30, 2016.

³ On February 16, 2016 OWCP authorized left shoulder arthroscopic surgery.

By decision dated August 2, 2016 and reissued on August 8, 2016, OWCP accepted appellant's claim for unspecified rotator cuff tear or rupture of the left shoulder, not specified as traumatic. It also accepted that she sustained a recurrence of disability beginning March 22, 2016 and paid her disability compensation effective that date. Appellant received wage-loss compensation on the supplemental rolls as of March 22, 2016, and on the periodic rolls as of September 18, 2016.

OWCP received daily notes from appellant's physical therapists which addressed the treatment of appellant's left shoulder condition from July 16 to August 12, 2016.

In a July 27, 2016 letter, Dr. Raphael noted a history of appellant's accepted injuries and the medical treatment he had provided to her. He reiterated her work duties. Dr. Raphael restated his September 30, 2015 findings, which included his opinion that since appellant's symptoms had progressed and failed to respond to conservative measures it was detrimental for her to continue working at that time. He related that she did not have a new injury. Appellant's symptoms spontaneously worsened to a level of intensity that would cause greater harm if she continued to work. Dr. Raphael pointed out that she fell in January 2016 and sustained a head injury that had absolutely no effect or impact on her left shoulder injury. Therefore, he advised that appellant's continuous disability status was unrelated to her fall.

On August 2, 2016 Dr. Raphael examined appellant and reiterated his assessment of left shoulder impingement syndrome. He continued to find that she was totally disabled for work and reiterated his conclusion in an October 10, 2016 report and October 12, 2016 Form OWCP-5c.

By decision dated December 20, 2016, an OWCP hearing representative affirmed the January 14, 2016 decision. She found that Dr. Raphael's reports were insufficient to establish that appellant's disability commencing October 1, 2015 was due to a worsening of her accepted work-related conditions.

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."⁴

When an appellant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establishing by the weight of the reliable, probative, and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is

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

causally related to the employment injury and supports this conclusion with sound medical reasoning.⁵

ANALYSIS

The Board finds that appellant has failed to submit sufficient medical evidence to establish a recurrence of total disability from October 1, 2015 to March 21, 2016 due to her accepted work injuries.

OWCP accepted that appellant sustained a work-related left shoulder impingement injury in the performance of duty. Appellant returned to regular-duty work on April 8, 2015 and stopped work on October 1, 2015. She claimed compensation for a recurrence of total disability commencing on October 1, 2015. OWCP subsequently accepted that appellant sustained unspecified rotator cuff tear or rupture of the left shoulder, not specified as traumatic. It also accepted that she sustained a recurrence of disability as of March 22, 2016, the date she underwent authorized left shoulder arthroscopic surgery.

In support of her recurrence claim, appellant submitted a series of reports from her attending physician, Dr. Raphael, beginning on September 30, 2015. Dr. Raphael diagnosed left shoulder subacromial impingement and partial nontraumatic tear of the left rotator cuff and addressed her medical treatment. While he determined that the diagnosed conditions were due to appellant's work duties and that she was temporarily totally disabled, he failed to offer a medical opinion specifically addressing whether her conditions and resultant disability were causally related to the accepted employment-related injuries. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁶ A mere conclusion without the necessary rationale is insufficient to meet a claimant's burden of proof.⁷ Further, the Board notes that Dr. Raphael attributed appellant's need to remain off work as a way to prevent future injury. However, the Board has held that fear of future injury is not compensable.⁸ For these reasons, these reports of Dr. Raphael are insufficient to establish a recurrence of total disability or work-related disability during the claimed period.

The remaining medical evidence of record is also insufficient to establish appellant's claim for recurrence of disability. The March 7, 2016 report of Dr. Stone provided preoperative diagnoses, which included sprain of the left rotator cuff capsule, initial encounter. However, this report did not offer a medical opinion addressing whether the diagnosed left shoulder conditions

⁵ *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

⁶ See *R.B.*, Docket No. 17-0556 (issued June 2, 2017); *J.D.*, Docket No. 16-0887 (issued November 4, 2016); *L.M.*, Docket No. 16-0143 (issued February 19, 2016).

⁷ See *E.L.*, Docket No. 17-1632 (January 3, 2018).

⁸ *I.J.*, 59 ECAB 408 (2008).

and any resultant disability during the claimed period were causally related to the accepted employment injuries.⁹

Appellant submitted physical therapy reports and notes dated March 5, 2015 to June 30, 2016. Physical therapists, however, are not considered physicians as defined under FECA and their reports have no probative value. Thus, these reports are insufficient to establish appellant's claim.¹⁰

It is appellant's burden of proof to establish the claim for compensation. The Board finds that appellant did not meet her burden of proof in this case.

On appeal counsel contends that the medical evidence supports that appellant had a material change in her left shoulder condition that resulted in further disability beginning September 29, 2015. As explained above, however, appellant has not submitted sufficient medical evidence to establish her recurrence claim.

Alternatively, counsel contends on appeal that OWCP should have found that the evidence supports a new injury. A subsequent injury, either an aggravation of the original injury or a new injury, is compensable if it is the direct and natural result of a compensable primary injury.¹¹ However, OWCP has not issued a decision on this aspect of the claim and it is not presently before the Board on this appeal.¹²

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 failed to meet her burden of proof to establish a recurrence of disability from October 1, 2015 to March 21, 2016 due to her accepted employment injuries.

⁹ *Supra* note 6.

¹⁰ 5 U.S.C. § 8101(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See E.W.*, Docket No. 16-1729 (issued May 12, 2017). Physical therapists are not considered physicians as defined under FECA. *R.U.*, Docket No. 17-0168 (issued January 9, 2018).

¹¹ *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

¹² *Patricia Hernandez*, Docket No. 04-1408 (issued December 30, 2005); *see also* 20 C.F.R. §. 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2018
Washington, DC

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

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

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