

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish total disability commencing October 25, 2014 causally related to her accepted September 3, 2014 employment injury; and (2) whether OWCP has met its burden of proof to rescind its acceptance of appellant's claim for aggravation of right shoulder joint instability.

FACTUAL HISTORY

On September 12, 2014 appellant, then a 22-year-old postal support employee window clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 3, 2014 she developed ligament damage in her right arm as a result of lifting and throwing parcels of mail throughout the week while in the performance of duty. She claimed that at the end of the day, on the date of injury, she felt her arm pop out of her shoulder. On the reverse side of the claim form and by letter dated September 25, 2014, appellant's immediate supervisor controverted her claim contending that she had not timely reported her alleged injury and that her injury was due to both a nonwork-related 2013 motor vehicle accident and a nonwork-related bilateral shoulder personal injury sustained on August 7, 2014. He indicated that appellant stopped work on September 4, 2014.

In support of her claim, appellant submitted medical evidence, including work status reports dated August 7 and September 8, 2014 from Dr. John F. Cummins, a Board-certified orthopedic surgeon. Dr. Cummins placed her off work from August 7 through 21, and September 8 through 26, 2014. He noted that appellant had bilateral shoulder injuries and that she was unable to perform any work involving the use of her upper extremity.

In a September 25, 2014 report, Dr. Lan Thi Linh Nguyen, an internist, noted that appellant sustained an injury on September 3, 2014 while lifting boxes. He examined her, diagnosed instability of the right shoulder joint, and indicated that she sustained a right shoulder subluxation in August 2014 during a physical altercation. Dr. Nguyen related that, during her initial visit, appellant had not fully explained that her right shoulder had subluxed, but he indicated that it was reported in a September 4, 2014 note. He released her to modified-duty work as of the date of his examination.

OWCP also received a September 25, 2014 report from Keith M. Thibault, a nurse practitioner, who diagnosed instability of the right shoulder joint and placed appellant on modified activity at work and home through October 21, 2014.

In a letter dated September 30, 2014, appellant's supervisor continued to challenge her claim. He asserted that appellant had not reported to him that she sustained an injury at work, or the time or location of the injury. Appellant had previously mentioned that she had a pin inserted into her shoulder/arm area and he believed that this was why she had pain in that area.

In a development letter dated October 1, 2014, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP received additional medical evidence. The reports provided a diagnosis of preexisting instability of the right shoulder joint, a request for authorization for right shoulder

surgery to be performed on November 23, 2014, and opined that her diagnosed condition was a nonindustrial condition that had been aggravated by her employment activities. Appellant was permitted to perform modified-duty work with restrictions from October 31 through November 27, 2014.

In a September 16, 2014 letter, a customer service employing establishment manager further challenged appellant's claim for compensation, contending that her claimed injury was caused by an April 17, 2013 nonwork-related car accident. He noted that appellant was off work for intermittent periods due to nonwork-related conditions until September 8, 2014 when she stopped work. The manager further contended that the September 3, 2014 alleged work incident did not occur as alleged, as clocking records showed that she was not lifting and throwing parcels, but was working at the finance window all day for eight hours on that day.

On October 21, 2014 appellant responded to OWCP's development questionnaire. She described the work duties she performed upon her return to work from maternity leave that she believed contributed to her claimed injury. Appellant noted her prior nonwork-related injuries which included a left shoulder injury on March 16, 2013 as a result of a motor vehicle accident for which she underwent surgery on April 23, 2013. She also sustained another left shoulder injury on August 4, 2014 due to an altercation.

In a report dated September 4, 2014, Dr. Tyronda S. Elliott, a resident physician, noted a history that on September 3, 2014 appellant experienced shoulder problems. She examined appellant and diagnosed right shoulder joint pain.

In a treating physician's progress report dated October 31, 2014, Dr. Nguyen reiterated his prior diagnosis of instability of the right shoulder joint and appellant's history of a right shoulder subluxation that occurred in August 2014 during a physical altercation. He opined that the diagnosed right shoulder condition was a nonindustrial condition and placed appellant on modified activity at work and home through November 27, 2014. Dr. Nguyen maintained that, but for her work duties as a window clerk, her preexisting condition would not have become disabling or needed the requested surgical treatment. He also noted that, although modified duties had been recommended, appellant reported that she was not working because the employing establishment was unable to accommodate her work restrictions. Dr. Nguyen advised that if modified activity was not accommodated by the employing establishment, then she was considered temporarily totally disabled from her regular work for the designated time.

On November 7, 2014 OWCP accepted appellant's claim for aggravation of right shoulder joint instability.

On November 18, 2014 appellant filed a Form CA-7 claim for compensation for leave without pay (LWOP) for the period October 25 to November 14, 2014.

On November 28, 2014 appellant filed an additional CA-7 form for LWOP for the period November 15 to 28, 2014.

In a development letter dated December 9, 2014, OWCP requested additional medical evidence establishing appellant's disability from work during the period claimed. Appellant was advised to submit a report from her physician which explained why she had not returned to work even with clear work restrictions and how this was medically necessary and connected to her September 3, 2014 work-related injury. OWCP related that if, however, the only reason she did

not return to work was due to her employing establishment's inability to accommodate her work restrictions then the employing establishment should submit written confirmation detailing the exact period that was not accommodated. OWCP afforded appellant 30 days to respond.

Additional medical evidence was received from Dr. Nguyen. In a report dated December 12, 2014, Dr. Nguyen continued to diagnose instability of right shoulder joint and to advise that appellant was capable of performing modified activity at work and home through January 7, 2015. He also continued to note appellant's history of a right shoulder dislocation due to the August 2014 altercation and left shoulder joint instability for which she was status post 2013 dislocation surgery. Dr. Nguyen opined that her current medical condition, more likely than not, was not caused or aggravated by factors of her employment. He related that his opinion was based on appellant's underlying and preexisting medical condition, shoulder joint instability, and mechanism of injury, lifting 10-pound boxes.

Dr. Cummins, in a postoperative follow-up report dated December 1, 2014, noted examination findings and provided an assessment of shoulder trauma/instability.

Appellant continued to file Form CA-7 claims for compensation for LWOP for the period November 29, 2014 to January 16, 2015 and submitted additional medical evidence from Dr. Cummins and Dr. Nguyen. In a work status report dated November 13, 2014, Dr. Cummins placed appellant on modified activities at home and work from November 22 through 24, 2014. He advised that she could return to full-capacity work on November 25, 2014.

In a work status report dated October 2, 2014, Dr. Nguyen placed appellant on modified activity at work and home from October 21 through November 21, 2014. He again advised that if modified activity was not accommodated by the employing establishment then appellant was temporarily totally disabled from her regular work for the designated time and a separate off work order was not required.

Dr. Michael E. Hebrard, a Board-certified physiatrist, noted in a January 6, 2015 report appellant's repetitive work duties and history of the accepted September 3, 2014 employment injury, also noting that she last worked on September 3, 2014. He diagnosed adhesive capsulitis, bicipital tenosynovitis, internal derangement, and history of instability of the right shoulder. Dr. Hebrard opined that appellant's work-related injury contributed to her disabling condition and resultant surgery. He further opined that she was totally disabled since she was unable to perform her repetitive work duties.

OWCP, by decision dated January 26, 2015, denied appellant's claims for compensation for LWOP commencing October 25, 2014. It found that she had not submitted sufficient medical evidence to establish that she was totally disabled from work, during the period claimed, causally related to her September 3, 2014 employment injury.

On February 6, 2015 appellant filed an additional Form CA-7 claim for LWOP compensation from January 17 to February 11, 2015. In support of her claim, she submitted a letter dated January 6, 2015 in which Dr. Hebrard confirmed that she was temporarily totally disabled. Dr. Hebrard advised that appellant was unable to perform her regular job and placed her off work through February 11, 2015.

On February 25, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the January 26, 2015 decision.

Appellant continued to file Form CA-7 claims for LWOP compensation from March 7 to May 29, 2015.

OWCP received additional medical evidence dated February 11 to September 14, 2015 from Dr. Hebrard who continued to treat appellant. Dr. Hebrard agreed with the diagnostic findings of a February 7, 2015 right shoulder magnetic resonance imaging (MRI) scan which demonstrated significant glenohumeral capsulitis and a modest rotator cuff tendinitis or strain. He noted that she also had an enthesopathic cyst at the infraspinatus and subscapularis attachment. Dr. Hebrard diagnosed subluxation, frozen shoulder, adhesive capsulitis, rotator cuff syndrome/bursitis, and derangement of the right shoulder, as well as rotator cuff syndrome and bursitis of the left shoulder. He opined that appellant's September 3, 2014 employment injury caused the diagnosed conditions, an aggravation of her underlying preexisting condition, and resultant right shoulder surgery. Dr. Hebrard placed her off work through April 13, 2015 and on May 26, 2015 released her to modified work with restrictions, five hours a day until her next clinic visit. He reiterated that if these restrictions could not be accommodated by her employing establishment, then she was temporarily totally disabled. Dr. Hebrard subsequently found that appellant was temporarily totally disabled and placed her off work from June 19 through 22, 2015. He noted that she could work four hours a day upon her return to work with her previous restrictions on June 22, 2015. Dr. Hebrard later determined on August 17, 2015 that appellant was again temporarily totally disabled until her next appointment or diagnostic testing.

Dr. Cummins, in a work status report dated November 13, 2014, placed appellant off work from November 24 through December 16, 2014 and advised that she could perform modified activity at home and work from December 17, 2014 through March 24, 2015. He determined that she could return to full-duty work on March 25, 2015.

By decision dated October 27, 2015, an OWCP hearing representative set aside the January 26, 2015 decision and remanded the case to OWCP for further development of the medical evidence. He found that while Dr. Hebrard's reports were not adequately rationalized, they were sufficient to warrant further development of the issue of whether appellant's total disability commencing October 25, 2014 and her resultant November 2014 right shoulder surgery were due to her accepted September 3, 2014 employment injury. The hearing representative remanded the case for OWCP to refer appellant for a second opinion examination.

On November 27, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. In a January 4, 2016 report, Dr. Swartz reviewed the SOAF and medical record, and noted a history of the September 3, 2014 employment injury. He also noted that appellant denied having prior problems with her right shoulder, but had problems with her left shoulder. Dr. Swartz reported examination findings. He advised that appellant had preexisting cystic degeneration at the humeral head of the cuff insertion of the right shoulder. Dr. Swartz noted, however, that this did not appear to be a finding that rendered her susceptible to instability or a dislocation. He referenced appellant's medical records, including Dr. Cummins' November 25, 2014 operative report, which indicated that appellant had a Bankart lesion in the anterior capsular labral structures, a preexisting condition, that rendered her susceptible to dislocation. Dr. Swartz also noted Mr. Thibault's September 25, 2014 report and Dr. Elliott's September 4, 2014 report, which documented that her right shoulder subluxed during a physical altercation which occurred two weeks prior to her accepted September 3, 2014 employment injury. He advised that appellant's right shoulder instability was a nonindustrial or

preexisting condition related to the physical altercation that took place two weeks prior to her September 3, 2014 date of injury and resulted in right shoulder subluxation as documented in her medical records. Despite his opinion on causal relationship, Dr. Swartz noted that it would be helpful to review appellant's medical records dating 5 to 10 years prior to her September 3, 2014 date of injury as she had a history of right and left shoulder dislocations. He advised that, based on the medical information available at that time, the temporary aggravation of appellant's current right shoulder instability ceased on that day. Dr. Swartz related that the temporary aggravation involved work-related disability and treatment such as, surgery to correct the instability. He indicated that appellant's November 2014 right shoulder surgery was appropriate treatment for her September 3, 2014 employment injury.

In a letter dated February 23, 2016, OWCP requested that appellant submit medical records from 5 to 10 years prior to the filing of her claim. On May 22, 2017 it received numerous medical records.

In a letter dated July 10, 2017, OWCP referred appellant for a second examination with Dr. Swartz. It provided Dr. Swartz with an updated SOAF, the medical record, and a series of questions.

On October 18, 2017 Dr. Swartz reviewed the medical evidence of record. He did not examine appellant. Dr. Swartz referenced his prior findings from the January 4, 2016 examination and his diagnosis of right shoulder adhesive capsulitis. He noted that appellant's nonindustrial preexisting condition of instability and dislocation of the right shoulder, resulting in shoulder surgery, were due to the nonindustrial injury of August 5, 2014, and were unrelated to the claim of injury on September 3, 2014. Dr. Swartz further noted that all treatment received subsequent to September 3, 2014 was unrelated to her claim for an industrial injury and employment at the employing establishment, and would be related only to the August 5, 2014 assault which caused a dislocated right shoulder. He indicated that appellant's right shoulder conditions included cystic degeneration of the humeral head at the cuff insertion and a Bankart lesion of the anterior capsular labral structures. Dr. Swartz related that these conditions reflected changes in the right shoulder that destabilized the shoulder and rendered appellant susceptible to dislocation, which occurred on August 5, 2014. He advised that she did not sustain a dislocated right shoulder on September 3, 2014. Dr. Swartz further advised that the findings of Dr. Cummins' November 2014 surgery were unrelated to the claim of injury on September 3, 2014 and related only to the nonindustrial assault injury of August 5, 2014. He maintained that all of appellant's diagnosed conditions were related to the nonindustrial August 5, 2014 assault. In addition, Dr. Swartz maintained that there was no disability caused by the August 5, 2014 injury as appellant reported that she "self-reduced" her shoulder and apparently went back to work fairly soon after this incident and performed her regular job on September 3, 2014. He related that her time off work and the treatment she received after September 3, 2014, including the November 2014 right shoulder surgery, were not due to an injury on that day, but due to the August 5, 2014 incident. Dr. Swartz concluded that no medical treatment was necessary for the claimed September 3, 2014 employment injury. There was also no physical limitations, restrictions, or disability related to the claimed injury.

OWCP, by decision dated November 2, 2017, again denied appellant's claim for compensation for LWOP commencing October 25, 2014 and authorization for her November 25, 2014 right shoulder surgery. It found that Dr. Swartz's October 18, 2017 report represented the

weight of the medical evidence and established that she was not disabled during the claimed period as a result of her accepted September 3, 2014 employment injury.

In a November 3, 2017 notice, OWCP advised appellant that it proposed to rescind its acceptance of her claim for aggravation of right shoulder joint instability based on its error. It found that the factual evidence of record failed to establish that the employment injury occurred as alleged, noting that she was injured while off duty on August 5, 2014. Further, OWCP noted that Dr. Swartz's opinion was well rationalized and established that appellant's right shoulder instability and dislocation were caused by the nonwork-related August 5, 2014 incident. It afforded her 30 days to submit evidence and argument challenging the proposed rescission action.

Appellant, through counsel, responded by letter dated December 2, 2017 disagreeing with the proposed rescission of the acceptance of appellant's claim.

By decision dated December 4, 2017, OWCP rescinded acceptance of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵

Under FECA, the term disability means "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."⁶ The question of whether an employee is disabled from work is an issue that must be resolved by competent medical evidence.⁷ The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.⁸

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁰

⁴ *Supra* note 3.

⁵ *See C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f).

⁷ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also R.C.*, 59 ECAB 546, 551 (2008).

⁸ *Id.*; *see T.A.*, Docket No. 18-0431 (issued November 7, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁹ *See S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹⁰ *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability, commencing October 25, 2014, causally related to her accepted September 3, 2014 employment injury.

In support of her claim for total disability commencing October 25, 2014, appellant submitted several medical reports from Dr. Cummins. In his reports, Dr. Cummins provided an assessment of right shoulder trauma/instability. He opined that appellant was totally disabled from work during the periods August 7 to 21 and September 8 to 26, 2014. However, these reports are of limited probative value in addressing appellant's claimed period of disability commencing October 25, 2014 as they occur prior to the alleged period and do not specifically address or attribute the period of claimed disability to the accepted condition.¹¹ Evidence that does not address appellant's accepted conditions and dates of disability is insufficient to establish her claim.¹² Moreover, while Dr. Cummins subsequently opined that appellant was totally disabled from work from November 24 to December 16, 2014, he did not explain with sufficient rationale as to how her inability to work was due to her accepted September 3, 2014 right shoulder injury, his opinion is of limited probative value and thus his report is insufficient to establish the claimed period of disability.¹³

Dr. Nguyen's October 31 and December 12, 2014 reports did not relate appellant's partial disability from work during the period October 31 through November 27, 2014 and December 12, 2014 through January 7, 2015 or her diagnosis of right shoulder joint instability to her September 3, 2014 employment-related right shoulder injury.¹⁴ He noted that it was more likely than not that her diagnosed right shoulder condition was not caused or aggravated by factors of her employment. The Board finds that Dr. Nguyen's reports are therefore not based on a complete and accurate factual background and are of diminished probative value.¹⁵ Moreover, his remaining September 25, 2014 report is insufficient to establish disability as it predates and does not address the claimed period of disability.¹⁶ Likewise, Dr. Elliott's September 4, 2014 report predates the claimed period of disability.¹⁷

Second opinion physician Dr. Swartz, in his January 4, 2016 and October 18, 2017 reports, maintained that there was no disability caused by the August 5, 2014 injury as appellant reported that she apparently went back to work fairly soon after this incident and performed her regular job on September 3, 2014. He related that her time off work and the treatment she received after September 3, 2014, including the November 2014 right shoulder surgery, were not due to an injury on that day, but due to the August 5, 2014 incident. Dr. Swartz concluded that no medical

¹¹ *D.J.*, Docket No. 18-0200 (issued August 12, 2019); *V.G.*, Docket No. 17-1425 (issued February 16, 2018).

¹² *T.L.*, *supra* note 10.

¹³ *T.H.*, Docket No. 19-0436 (issued August 13, 2019); *C.B.*, Docket No. 18-0040 (issued May 7, 2019).

¹⁴ *Id.*

¹⁵ *S.M.*, Docket No. 16-1142 (issued March 15, 2017); *J.C.*, Docket No. 07-1246 (issued December 13, 2007).

¹⁶ *Supra* note 11.

¹⁷ *Id.*

treatment was necessary for the claimed September 3, 2014 employment injury. There was also no physical limitations, restrictions, or disability related to the claimed injury. As Dr. Swartz reviewed the medical record and supported his conclusion with medical rationale, the Board finds that his report represents the weight of the evidence regarding appellant's claim for total disability.

As the medical evidence of record is insufficient to establish that appellant was disabled from work for the period commencing October 25, 2014 due to her accepted right shoulder condition, the Board finds that appellant has not met her burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

OWCP may reopen a claim at any time on its own motion and may modify, rescind, decrease, or increase compensation previously awarded, or award compensation previously denied.¹⁸ Once OWCP accepts a claim, it has the burden of justifying termination or modification of benefits.¹⁹ This burden applies even where OWCP later decides that it erroneously accepted a claim.²⁰ OWCP must provide a clear rationale for rescinding acceptance of a claim.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP has met its burden of proof to rescind its acceptance of appellant's claim for aggravation of right shoulder joint instability.

Second opinion physician Dr. Swartz provided rationalized medical evidence establishing that appellant did not sustain an aggravation of right shoulder joint instability on September 3, 2014. In his January 4, 2016 and October 18, 2017 second opinion reports, he found that appellant's right shoulder instability and dislocation, and resultant November 25, 2014 surgery were causally related to her August 5, 2014 nonwork-related domestic violence incident. Dr. Swartz reviewed the medical record, including numerous medical records which documented the August 5, 2014 incident. He explained that appellant had cystic degeneration of the humeral head at the cuff insertion and a Bankart lesion of the anterior capsular labral structures of the right shoulder, which demonstrated changes that destabilized the shoulder and rendered her susceptible to dislocation, which occurred on August 5, 2014.²² Accordingly, OWCP's initial acceptance of appellant's claim was in error.

On appeal counsel contends that OWCP's December 4, 2017 decision erroneously rescinded acceptance of appellant's claim as it lacks sufficient legal basis, citing the Board's

¹⁸ 20 C.F.R. § 10.610; 5 U.S.C. § 8128(a).

¹⁹ See *M.B.*, Docket No. 17-0688 (issued March 15, 2018); *Delphia Y. Jackson*, 55 ECAB 373, 376 (2004).

²⁰ *Id.*

²¹ *Id.*

²² *J.F.*, Docket No. 17-0288 (issued May 23, 2017).

holding in the case of *Roseanna Brennan*.²³ In that case, the Board found that OWCP improperly rescinded acceptance of appellant's recurrence of disability because it had not identified new evidence, legal arguments, or rationale to justify its rescission of appellant's recurrence of disability on the basis that the acceptance was erroneous. In the instant case, however, OWCP presented new evidence, by way of the voluminous Kaiser Permanente medical records and Dr. Swartz's October 18, 2017 report, regarding appellant's claimed September 3, 2014 right shoulder injury as to cast serious doubt upon the validity of the claim. In its December 4, 2017 decision, it explained how this new evidence established that appellant had not sustained a right shoulder injury at work on September 3, 2014. OWCP presented sufficient new evidence and argument to justify the rescission of its acceptance of appellant's claim for aggravation of right shoulder joint instability.

Counsel further contends on appeal that Dr. Swartz's opinion is not entitled to the weight of the medical evidence as it is inadequate under the law. However, Dr. Swartz reviewed the medical record and supported his conclusion with medical rationale. Thus, the Board finds that his report represents the weight of the evidence with regard to the rescission of the accepted claim.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability, commencing October 25, 2014, causally related to her accepted September 3, 2014 employment injury. The Board further finds that OWCP has met its burden of proof to rescind its acceptance of appellant's claim for aggravation of right shoulder joint instability.

²³ 41 ECAB 92 (1989).

ORDER

IT IS HEREBY ORDERED THAT the December 4 and November 2, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 21, 2019
Washington, DC

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

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

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