

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

_____)	
L.F., Appellant)	
)	Docket No. 19-0519
and)	Issued: October 24, 2019
)	
U.S. POSTAL SERVICE, POST OFFICE, North Metro, GA, Employer)	
_____)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
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
JANICE B. ASKIN, Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from a July 12, 2018 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 Board notes that following the July 12, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing April 7, 2014 causally related to her accepted October 19, 2012 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 24, 2012 appellant then a 45-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a sharp pain in her left shoulder on October 19, 2012 when lifting a 52-pound sack of mail onto the scale while in the performance of duty. She returned to light-duty work on October 24, 2012. On November 30, 2012 OWCP accepted appellant's claim for sprain of the left shoulder. On April 2, 2013 it expanded acceptance of her claim to include shoulder tendinitis on the right.

On April 9, 2013 appellant accepted a modified assignment as a mail processing clerk with no use of her right arm.

On November 13, 2013 appellant's attending physician, Dr. Stephen Dawkins, a physician Board-certified in physical medicine, indicated that appellant was unable to perform her regular job and restricted her pushing, pulling, lifting, squatting, kneeling, and climbing.

The employing establishment offered appellant a limited-duty assignment on November 25, 2013 as a mail processing clerk. Appellant's duties included signing in express mail for two hours, relieving clerks on the automated parcel bundle sorter (ASPBS) machine for two hours, sorting mail, and scanning the foreign mail on the dock for two hours. The physical requirements were pushing, pulling, lifting, squatting, and kneeling up to 20 pounds and walking and standing for two hours a day. Appellant accepted this position on November 25, 2013.

On November 26, 2013 Dr. Dawkins opined that appellant could work with express mail, but could not lift over 20 pounds or perform repetitive work with the use of her upper extremities. He further noted that she could only work in an indoor heated area.

Dr. Dawkins examined appellant again on April 8, 2014 and opined that appellant could continue modified work, lifting up to 20 pounds with no overhead work.

Commencing on May 15, 2014 appellant filed claims for compensation (Form CA-7) requesting intermittent period of compensation for leave without pay (LWOP) and night differential pay for the period beginning on April 7, 2014.

In support thereof, appellant submitted an April 7, 2014 report from Dr. Zouheir Shama, a general surgeon. He noted appellant's history of injury and that she stopped work on January 14, 2013 due to pain. Appellant reported that she was unable to perform all of her duties as she could

⁴ Docket No. 15-1069 (issued August 12, 2015).

not lift and load heavy sacks. Dr. Shama diagnosed bilateral shoulder sprain and tendinitis. He opined that appellant had sustained a consequential right shoulder injury as a result of overcompensating for the injury to her left shoulder. In a separate report of the same date, Dr. Shama opined that appellant's modified work had aggravated her condition and that Dr. Dawkins request for sedentary work was not honored by the employing establishment. He noted that appellant was required to lift and push mail. Dr. Shama took her off work until May 5, 2014 and listed her restrictions as no lifting more than 20 pounds, no carrying, no walking more than 5 minutes at a time, sedentary duties that did not involve her shoulders, no lifting above the shoulder and no fine manipulation for more than 30 minutes at a time.

In a May 23, 2014 development letter, OWCP informed appellant that additional medical evidence was needed to support her claim for compensation for the period April 7 through May 3, 2014.

OWCP subsequently received a May 27, 2014 report from Dr. Shama, who repeated his findings that appellant was forced to work outside of her restrictions including excessive walking, standing, rising from seated positions, lifting, and use of her hands, arms, and shoulders in the duties assigned rather than having her perform the sedentary duties described in the modified assignment. Dr. Shama noted pain and discomfort in her shoulder. He noted that appellant was not allowed to return to work on May 5, 2014 within the restrictions that he provided. Dr. Shama diagnosed bilateral shoulder sprain and shoulder tendinitis.

In a letter dated June 18, 2014, appellant requested that Dr. Shama become her treating physician as Dr. Dawkins had not believed that he could provide further assistance and had referred her to Dr. Shama. On July 7, 2014 Dr. Dawkins indicated that appellant could perform modified work lifting up to 20 pounds with no overhead work.

By decision dated July 23, 2014, OWCP denied appellant's claims for compensation for the period commencing April 7, 2014 finding that she had not submitted evidence establishing that she was required to work outside of her restrictions.

On August 6 and 13, 2014 appellant requested reconsideration of the July 23, 2014 decision. In a letter dated August 4, 2014, she alleged that she was in pain and did not feel that her physicians were listening to her. Appellant informed Dr. Dawkins that the modified duties assigned to her by the employing establishment violated his work restrictions and he was not sympathetic. She argued that Dr. Shama was her treating physician and that the employing establishment was unable to provide her with work within restrictions established by Dr. Shama.

In a report dated July 29, 2014, Dr. Shama noted that Dr. Dawkins referred appellant to him for evaluation and treatment. He reported appellant's history of injury and accepted shoulder conditions. Dr. Shama noted that Dr. Dawkins returned appellant to modified work in November 2013, but that she asserted that she was required to work beyond her prescribed limitations. He concluded that she should not lift more than 20 pounds and should not perform repetitive work using her shoulder and arms. Dr. Shama further indicated that appellant had limited range of motion resulting from repetitive use of her shoulders. He opined that she was totally disabled from April 7 through May 15, 2014 at which point he found that she was refused work within her restrictions.

In a development letter dated August 14, 2014, OWCP noted that it appeared that appellant was claiming disability due to a material change or worsening of her accepted employment injuries. It requested that she provide additional evidence if she believed that she had sustained a recurrence of disability due to a spontaneous worsening of her injury-related condition.

On August 21, 2013 appellant responded that she was required to stand, bend, stoop, and twist in performing express mail duties. She further alleged that the work area was located next to the open dock exposing her to the cold in the winter. Appellant noted that she was assigned to work ASPBS duties which involved reaching and processing up to 1,600 pieces of mail an hour. She alleged that this was the most repetitive task at the employing establishment. Appellant also indicated that she was required to sort and distribute parcels and packages of all sizes; pull sacks of mail that weighed up to 70 pounds; scan foreign mail, which included items weighing more than 20 pounds; and exposure to cold weather. She noted that she could perform limited-duty work if appropriate limited-duty work was provided for her.

By decision dated September 15, 2014, OWCP authorized appellant's request to change physicians to Dr. Shama.

In a report dated October 9, 2014, Dr. Shama noted that appellant reported increased shoulder pain while working. He noted that she continued to have residuals of her initial shoulder injury and required further medical treatment.

On October 9, 2014 the employing establishment submitted a statement and denied appellant's allegations that she was provided work beyond her restrictions. The employing establishment noted that she did not have to lift packages over 20 pounds in the express operation as the regular-duty clerks pushed the mail to her with the tag face up for her to sign in the mail. The employing establishment submitted a witness statement from a coworker dated October 8, 2014 asserting that he worked with appellant in the express operation and that she did not lift heavy packages.

By decision dated October 27, 2014, OWCP denied modification of the July 23, 2014 decision, finding that appellant had not established that she was totally disabled beginning April 7, 2014. It noted that Dr. Shama's reports were based on an inaccurate factual background as appellant's assigned work was within her restrictions.

On November 19, 2014 appellant requested reconsideration of the October 27, 2014 decision. She provided additional medical evidence. In reports dated November 10 and 18, 2014, Dr. Shama again noted that the work that appellant was required to perform exceeded her restrictions and was causing additional injury. He noted that when working in the highway and express units appellant was reaching into wire containers lifting large envelopes, parcels, and other mail which required her to perform repetitive work with her shoulders, arms, and hands, including pulling the mail down from one belt to the next. Dr. Shama concluded that these duties aggravated appellant's accepted shoulder conditions. He noted that appellant was taken off work to allow her injured shoulder to be rehabilitated and that she was unable to continue to perform the repetitive duties of her modified position without causing further injury to her shoulder and negating the effect of medical treatment. Dr. Shama opined that she was "temporarily totally disabled from work beginning April 7, 2014 through the present" as she was held off from work during this time to avoid causing further damage to her shoulders and to allow her to respond to physical rehabilitation.

Appellant submitted a witness statement from C.W., a coworker, dated November 7, 2014 indicating that an express mail clerk must continually walk to check and sign in automobile parts. C.W. noted that he had witnessed appellant bending over into wire cages and containers to sign the mail into the systems. Appellant further explained that while a coworker would weigh heavy mail for her, she still had to manipulate the mail piece in order to scan the label. C.W. noted that the express mail operation was located directly across from the airline dock doors which were open to the outside and the area was so cold that employees wore hats, coats, gloves, and scarves while working and that the highway operation required appellant to sort mail into priority sacks which could hold up to 70 pounds of mail. Once a sack was full, it must be pulled and replaced with an empty sack.

The employing establishment responded on December 16, 2014 and again denied appellant's allegations of working outside of her restrictions. It submitted a witness statement alleging that she never performed heavy lifting and simply signed in flats thrown in cars.

In a statement dated December 24, 2014, appellant alleged that, while she received help with heavy packages, she was required to stand to sign in express mail. She also disagreed with the most recent witness statement.

By decision dated January 5, 2015, OWCP denied modification of its prior decision. Appellant subsequently appealed to the Board.

By decision dated August 12, 2015, the Board found that appellant had not met her burden of proof to establish a recurrence of total disability, that she had not established that she was required to work beyond her restrictions, and that as such, Dr. Shama's reports were based on an improper factual background, failed to provide detailed physical findings, and failed to provide medical reasoning in support of his opinions that appellant was unable to perform light-duty work without additional restrictions. The Board found that appellant had not met her burden of proof to establish disability from work for the period beginning April 7, 2014.

On November 3, 2015 appellant requested reconsideration. She continued to contend that her light-duty assignment required that she work outside of her restrictions.

By decision dated November 16, 2015, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

On December 28, 2015 appellant again requested reconsideration. She alleged that she was sent home by the employing establishment on May 5, 2014 and not allowed to work based on Dr. Shama's restrictions. Appellant provided a February 19, 2015 statement from the postal union asserting that she was denied reasonable accommodation shortly after May 5, 2014. In a February 19, 2015 letter, received by OWCP on December 28, 2015, the employing establishment asserted that there was no work available within appellant's work restrictions on and after July 17, 2014. On February 20, 2015 a coworker described appellant's work activities including bending over to scan labels, walking, and exposure to cold. She also noted that appellant was required to perform repetitive reaching and twisting of her torso.

By decision dated February 3, 2016, OWCP denied modification of its prior decisions. It found that the medical evidence did not establish that appellant's ongoing work restrictions were causally related to her accepted employment injuries.

In notes dated November 12 and 25, 2015, and January 6, 2016, Dr. Vikash C. Modi, a Board-certified family practitioner, described appellant's condition. He diagnosed hypertension, synovitis and tenosynovitis of the ankle and foot, degenerative arthritis, adhesive tendinitis of the shoulder, sacroiliac inflammation, depression, and fibromyalgia. Appellant also provided notes from Erica Payne, a family nurse practitioner, from June 2016 through April 2017.

On February 7, 2017 appellant requested reconsideration of OWCP's February 3, 2016 decision. She alleged that the employing establishment was providing inaccurate information by indicating that limited-duty work was made available. Appellant asserted that on May 5, 2014 the employing establishment sent her home as it found that there was no work available within the restrictions prescribed by her physician. She contended that she did not stop work on January 14, 2014, but instead took leave. Appellant also alleged that Dr. Shama did not increase her work restrictions. She contended that the previously submitted witness statements demonstrated that the employing establishment provided her with a variety of assignments beyond those listed in the August 2013 modified job offer. Appellant also asserted that the modified job offer was never within her restrictions. She requested LWOP compensation from May 5, 2014 and continuing as management found no suitable light-duty work available to her.

By decision dated May 8, 2017, OWCP denied modification of its prior decisions. It issued this decision without the appropriate appeal rights. On June 12, 2017 OWCP provided appellant with a copy of the appeal rights for the May 8, 2017 decision dated June 12, 2017.

In a note dated May 30, 2017, Dr. George Capo, an osteopath Board-certified in family medicine, examined appellant's bilateral shoulders. He diagnosed chronic shoulder pain and noted that appellant had not worked in three years. On June 13, 2017 Dr. Capo examined appellant due to low back pain related to a 2010 employment injury. He diagnosed low back pain and sciatica on the right. In a July 12, 2017 note, Dr. Capo examined appellant due to foot pain and noted that she had a history of surgery for bilateral plantar fasciitis in 2010. He recommended that appellant avoid prolonged standing and walking.

On September 20, 2017 Dr. Daniel R. Orcutt, a Board-certified orthopedic surgeon, examined appellant due to her bilateral shoulder conditions. He diagnosed bilateral shoulder pain and osteoarthritis. Dr. Orcutt listed appellant's work restrictions as no lifting over 5 pounds, no pushing or pulling over 10 pounds, and no outstretched reaching or working above shoulder level. On October 6, 2017 he injected appellant's left shoulder. Dr. Orcutt repeated his work restrictions. He examined appellant on November 3, 2017 and repeated his diagnoses of bilateral shoulder pain, osteoarthritis, and rotator cuff syndrome. Dr. Orcutt continued to support work restrictions. On December 1 and 22, 2017 as well as January 31 through April 2018 he repeated his diagnoses and work restrictions due to appellant's bilateral shoulder conditions. Dr. Orcutt noted that appellant had developed the onset of lumbar radiculopathy, foot pain, and low back pain in September 2017.

On March 28, 2018 Dr. Orcutt provided additional work restrictions attributed to appellant's lumbar condition indicating that she could lift up to 20 pounds, push and pull up to 30 pounds, no excessive twisting, and no kneeling or crawling. He continued to provide treatment notes regarding appellant's various conditions on April 25 and 27, 2018. In an April 27, 2018 note, Dr. Orcutt noted appellant's history of injury in October 2012 as lifting a 50-pound mailbag. He diagnosed bilateral shoulder pain, bilateral osteoarthritis of the shoulders, bilateral rotator cuff syndrome, and strain of the left trapezius muscle.

On June 1, 2018 Dr. Orcutt repeated his work restrictions due to appellant's bilateral shoulder condition.

On June 12, 2018 appellant requested reconsideration of the June 12, 2017 OWCP decision. She provided documents addressing the National Reassessment Process (NRP) and actions of the employing establishment in 2010. Appellant provided a September 3, 2010 letter from the employing establishment regarding the NRP. She also submitted August 24, 2009 and March 30, 2011 letters from the employing establishment informing her that no work was available within her work restrictions. Appellant submitted a June 12, 2013 Merit Systems Protection Board decision finding that the employing establishment was required to restore her to work.

In support of her June 12, 2018 request for reconsideration, appellant also provided a June 1, 2018 note from Dr. Orcutt repeating his previous findings and conclusions. She provided a June 29, 2018 note repeating his previous work restrictions due to her bilateral shoulder conditions.

By decision dated July 12, 2018, OWCP denied modification of its previous decisions.

LEGAL PRECEDENT

A recurrence of disability means 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.⁵ 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 her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed the established physical limitations.⁶

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-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 he or she cannot perform such limited-duty work. 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 limited-duty job requirements.⁷ This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally

⁵ 20 C.F.R. § 10.5(x). *S.W.*, Docket No. 18-1489 (issued June 25, 2019).

⁶ *Id.*

⁷ *J.B.*, Docket No. 18-1752, 19-0792 (issued May 6, 2019).

related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.⁸

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.⁹ Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

ANALYSIS

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

Preliminarily, it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 5, 2015 decision because it has already considered that evidence in its August 12, 2015 decision.¹²

The employing establishment offered appellant a light-duty position on November 25, 2013 as a modified mail processing clerk with the employing establishment. Appellant's duties included signing in express mail for two hours, relieving clerks on the ASPBS machine for two hours, sorting mail, and scanning the foreign mail on the dock for two hours. The physical requirements were pushing, pulling, lifting, squatting, and kneeling up to 20 pounds and walking and standing for two hours a day. Appellant accepted the position on November 25, 2013. She presented evidence that her attending physician Dr. Shama reported that she was unable to perform all of her duties as she could not lift and load heavy sacks. Appellant asserted that on May 5, 2014 the employing establishment sent her home as it found that there was no work available within the restrictions prescribed by Dr. Shama.

Appellant also submitted a February 19, 2015 letter, received by OWCP on December 28, 2015, in which the employing establishment explained that there was no work available within appellant's work restrictions on and after July 17, 2014.

The Board finds that factual evidence of record is insufficient to determine whether appellant is claiming a recurrence of disability due to a withdrawal of her light-duty position or because Dr. Shama increased her work restrictions and determined that her condition no longer

⁸ *L.F.*, Docket No. 14-1817 (issued February 2, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

⁹ *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹⁰ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *L.D.*, *id.*; see also *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹² See *K.K.*, Docket No. 17-1061 (issued July 25, 2018).

allowed her to perform the modified-duty position.¹³ As noted above, OWCP's regulations allow for a claimant to establish a recurrence of disability under either scenario.¹⁴ Accordingly, the evidence of record must contain accurate information regarding her claim in order for the Board to determine whether she sustained a recurrence of disability beginning April 7, 2014 because of a change or withdrawal of her limited-duty assignment or because of a change and worsening of her accepted conditions.¹⁵

On August 4, 2014 OWCP requested, in a development letter, that appellant provide additional evidence if she believed that she had sustained a recurrence of disability due to a spontaneous worsening of her injury-related condition. The Board does not find that the employing establishment was instructed to provide information in its possession regarding whether the modified-duty employment position in which she work commencing November 25, 2013 was withdrawn or modified during the period in which appellant claims wage-loss compensation and compensation for night differential pay. The record does contain a February 19, 2015 letter in which the employing establishment confirmed that there was no work available within appellant's restrictions commencing July 17, 2014. This letter does not, however, establish the duration of the inability of the employing establish to provide light-duty work or the specific reason why the work was unavailable.

It is well established that proceedings under FECA are not adversarial in nature and, while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ Once OWCP undertook development of the evidence by requesting additional information regarding the factual evidence of the claimed recurrence of disability, it had a duty to secure appropriate information addressing the relevant issues.¹⁷ Accurate information regarding appellant's work status and whether her limited-duty assignment had changed or was withdrawn for a specific period is essential to determine whether she sustained a recurrence of disability beginning on April 7, 2014 and the duration of such a recurrence. OWCP must, therefore, further develop the factual evidence necessary to evaluate the claimed recurrence and then provide proper factual findings as to whether appellant's limited-duty assignment had changed or was withdrawn, resulting in a recurrence of disability.¹⁸ This evidence is of the character normally obtained by the employing establishment and is more readily accessible to OWCP than to appellant.¹⁹

¹³ See *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

¹⁴ *Supra* note 5.

¹⁵ See *J.G.*, Docket No. 17-0910 (issued August 28, 2017); *M.A.*, Docket No. 16-1602 (issued May 22, 2017).

¹⁶ *A.W.*, *supra* note 13; *Donald R. Gervais*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

¹⁸ See *Y.R.*, Docket No. 10-1589 (issued May 19, 2011).

¹⁹ *J.T.*, Docket No. 15-1133 (issued December 21, 2015); *J.S.*, Docket No. 15-1006 (issued October 9, 2015).

Upon remand, OWCP should request that the employing establishment furnish documentation regarding appellant's work status for the applicable period and also clarify whether appellant's modified-duty assignment had changed to or withdrawn as appellant has alleged.²⁰

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 24, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²⁰ *D.M.*, Docket No. 18-0527 (issued July 29, 2019).