

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability for the period June 13 through July 4, 2018 due to his accepted February 23, 2017 employment injury.

FACTUAL HISTORY

On February 23, 2017 appellant, then a 44-year-old utility repair operator foreman, filed a traumatic injury claim (Form CA-1) alleging that on that date he pulled his left shoulder out of joint and strained his back while in the performance of duty. He stopped work on February 23, 2017. OWCP accepted the claim for a strain of unspecified muscles, fascia, and tendons at the left shoulder and upper arm level.⁴ It paid appellant compensation for total disability for the period April 28 through September 15, 2017. OWCP placed him on the periodic rolls effective November 11, 2017.

On November 16, 2017 Dr. Randall Roy, who specializes in orthopedic sports medicine, performed a left shoulder arthroscopic debridement and Bankart repair with capsular shift.

Following surgery, appellant resumed modified employment on March 1, 2018.

In a report dated June 1, 2018, Dr. Roy found that appellant had an incomplete rotator cuff tear or rupture of his left shoulder. He scheduled a July 5, 2018 arthroscopic debridement, subacromial decompression, and open biceps tenodesis with a possible rotator cuff repair and possible revision of a Bankart repair. Dr. Roy diagnosed left shoulder bicipital tendinitis, a degenerative tear of the left glenoid labrum, and left shoulder joint instability. He opined that appellant "could continue working limited duty." In a work status note of even date, Dr. Roy indicated that he would "not be returning to work until after the surgery" which was scheduled for July 5, 2018.

On June 25, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for the period June 13 to 22, 2018. On July 6, 2018 he filed a Form CA-7 requesting wage-loss compensation for the period June 22 to July 6, 2018.

In a development letter dated July 9, 2018, OWCP advised appellant that the evidence he had submitted was insufficient to establish that he was disabled from his modified employment beginning June 13, 2018. It notified him of the evidence necessary to establish his claim. OWCP afforded appellant 30 days to submit additional evidence.

Thereafter, appellant submitted a June 20, 2018 report from Dr. Roy. Dr. Roy repeated his previous diagnosis of left shoulder rotator cuff tear or rupture, left shoulder bicipital tendinitis, a degenerative tear of the left glenoid labrum, and instability of the left shoulder joint. He advised that appellant was unable to work due to his shoulder and arm pain and could not lift anything with his left upper extremity to prevent his condition from worsening.

⁴ Appellant additionally alleged that on March 13, 2017 he reinjured his shoulder. OWCP assigned File No. xxxxxx491.

On June 29, 2018 Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the evidence and noted that a recent magnetic resonance arthrogram showed a 50 to 60 percent rotator cuff tear. He advised that the left shoulder surgery proposed by Dr. Roy was in fact medically necessary and causally related to appellant's accepted employment injury, noting that he had "evidence of ongoing pain and functional disturbance." Dr. Fellars reviewed Dr. Roy's June 1, 2018 report and concurred with his findings.

On July 5, 2018 appellant underwent an arthroscopic debridement, subacromial decompression, and revision of an anterior labral tear. OWCP paid him wage-loss compensation for total disability beginning July 5, 2018.

On July 26, 2018 Dr. Roy advised that appellant had been off work from June 13, 2018 until the surgery "due to bicipital tendinitis of his left shoulder, a degenerative tear of his left glenoid labrum, instability of the left shoulder joint, and an incomplete rotator cuff tear or rupture of the left shoulder...."

By decision dated August 28, 2018, OWCP denied appellant's claim for wage-loss compensation for the period June 13 through July 4, 2018.

On September 5, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on February 8, 2019. Appellant testified that he had performed modified employment subsequent to his first shoulder surgery. His physician advised him to take off work before his second surgery to prevent further damage to his shoulder, which kept "slipping out of socket."

In a report dated February 15, 2019, Dr. Roy noted:

"[Appellant] missed work from June 13 through July 4, 2018 prior to his surgical procedure because he had persistent and recurrent left shoulder instability which was documented by his physical therapist and; therefore, I did not want him to further injure his shoulder prior to his scheduled revision procedures which was July 5, 2018. This restriction was substantiated during his revision procedure in which there was a torn suture and he had to have a revision anterior labral repair along with an open biceps tenodesis procedure."

By decision dated March 12, 2019, OWCP's hearing representative affirmed the August 28, 2018 decision.

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 resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁵ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because

⁵ 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations.⁶ A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁷

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁸

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

ANALYSIS

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

Appellant has not alleged that the employing establishment withdrew the limited-duty position he performed subsequent to his November 16, 2017 left shoulder debridement and Bankart repair. Instead, he maintained that his condition had worsened such that he was unable to perform the functions of his limited-duty position. Appellant must, therefore, provide medical evidence establishing that he was disabled due to a worsening of his accepted employment-related condition.¹¹

In support of his claim for employment-related disability from June 13 through July 4, 2018, appellant submitted reports from Dr. Roy. On June 1, 2018 Dr. Roy diagnosed left shoulder bicipital tendinitis, a degenerative tear of the left glenoid labrum, and left shoulder joint instability. He found that appellant had a partial left rotator cuff tear or rupture and scheduled shoulder surgery for July 5, 2018. Dr. Roy indicated that he could perform modified employment. However, in a

⁶ *Id.*; see also *M.G.*, Docket No. 19-0610 (issued September 23, 2019).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁹ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹⁰ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

¹¹ *M.S.*, Docket No. 19-0609 (issued September 23, 2019).

work status note of even date, he opined that appellant would not return to work until after the scheduled July 5, 2018 surgery.

In a report dated June 20, 2018, Dr. Roy diagnosed a left shoulder rotator cuff tear or rupture, left shoulder bicipital tendinitis, a degenerative tear of the left glenoid labrum, and instability of the left shoulder joint. He found that appellant could not work due to pain in his shoulder and arm. Dr. Roy further opined that he should avoid lifting with his left upper extremity to prevent his condition worsening.

On July 26, 2018 Dr. Roy opined that appellant was unable to work from June 13, 2018 until after his surgery due to the diagnosed conditions of left shoulder bicipital tendinitis, a left glenoid labrum tear, left shoulder joint instability, and a partial left rotator cuff tear.

In a February 15, 2019 report, Dr. Roy advised that appellant was off work from June 13 through July 4, 2018 due to recurrent instability in his left shoulder. He related that he did not want him to cause further injury to his left shoulder before his July 5, 2018 surgery, noting that the surgery had confirmed that he had a torn suture.

The Board finds that Dr. Roy's reports contains a history of injury, firm diagnosis, and an opinion that appellant was unable to work from June 13 through July 4, 2018 due to his need for additional surgery as a result of his accepted employment injury. Dr. Fellars, the DMA, reviewed his June 1, 2018 report and concurred with his findings and indicated there was evidence of ongoing pain and functional disturbance. However, Dr. Roy opined that appellant was disabled from work both due to his condition and his need to avoid his condition worsening pending surgery. To the extent that he is asserting that continuing to work might cause further injury, the Board has held that fear of future injury is not compensable.¹² Dr. Roy's reports, while raising an uncontroverted inference of causal relationship between his accepted employment condition and the claimed period of disability, require clarification regarding whether appellant's accepted condition or a fear of future injury disabled him from employment during the period in question.¹³

The Board, therefore, will remand the case for OWCP to obtain a supplemental report from Dr. Roy clarifying whether appellant's accepted condition prevented him from performing his limited-duty position for the period June 13 through July 4, 2018. After this and any further development deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

¹² Appellant's fear of future injury is not compensable. *J.O.*, Docket No. 19-1047 (issued November 13, 2019); *Paul A. Clarke*, 43 ECAB 940 (1992). Further, the opinion of a physician that a claimant is unable to work due to a fear of future injury is also not compensable. *P.D.*, Docket No. 18-1461 (issued July 2, 2019). There must be medical evidence showing that a claimant is currently disabled for work due to his or her employment-related condition. *O.L.*, Docket No. 15-1541 (issued January 7, 2016); *William A. Kandel*, 43 ECAB 1011 (1992).

¹³ *J.D.*, Docket No. 17-1520 (issued February 20, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2019 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: February 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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