

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

R.M., Appellant	)	
	)	
and	)	Docket No. 20-0486
	)	Issued: June 9, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Frenchburg, KY, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 2, 2020 appellant, through counsel, filed a timely appeal from a November 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

---

<sup>1</sup> 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.

<sup>2</sup> The record also contains a December 12, 2019 OWCP merit decision. Counsel, however, has only appealed from the November 18, 2019 decision. Thus, the December 12, 2019 is not before the Board on this appeal. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing February 15, 2019, causally related to her accepted January 24, 2017 employment injury.

### **FACTUAL HISTORY**

On February 10, 2017 appellant, then a 52-year-old postal clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on January 24, 2017 when a buffer jerked her arm while in the performance of duty. She stopped work on February 10, 2017. OWCP accepted the claim for a full-thickness right shoulder rotator cuff tear.

Appellant accepted a modified job offer on February 21, 2017 as a part-time flexible clerk, working two hours a day, with simple grasping, fine manipulation and sitting each limited to one half-hour a day, and walking and standing limited to an hour and a half each day. On February 6, 2018 she underwent authorized right shoulder arthroplasty. OWCP paid appellant wage-loss compensation on the supplemental rolls effective February 6, 2018, and the periodic rolls effective April 1, 2018.

In a May 4, 2018 report, Dr. Ryan Donegan, a Board-certified orthopedic surgeon, diagnosed post superior capsule reconstruction and recommended that appellant continue with physical therapy. He noted that she could not perform activities which required use of the right upper extremity.

On May 25, 2018 appellant accepted a modified-duty position as a part-time flexible clerk for 2 hours a day, 10 hours a week. The duties included answering the telephone, computer work, and scanning mail with use of the left hand. No lifting was required and the job involved sitting at a desk only. By decision dated June 6, 2018, OWCP found that appellant returned to alternate work as a modified postal clerk, working two hours a day effective May 29, 2018. It terminated her periodic compensation payments, effective May 29, 2018. OWCP continued to pay appellant wage-loss compensation on the supplemental rolls based upon her actual wages in her capacity as a modified postal clerk.

In a June 8, 2018 report, Dr. Donegan diagnosed right shoulder extensive debridement, subacromial decompression acromioplasty, superior capsular reconstruction, rotator cuff repair, and cadaver grafting. He recommended a return to modified-duty work with no use of the right

---

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the November 18, 2019 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.*

upper extremity. Dr. Donegan completed a work capacity evaluation (Form OWCP-5c) and recommended sedentary work for no more than eight hours per day, with restrictions of no reaching, no reaching above the shoulder, and no pushing, pulling, or lifting with the right upper extremity.

In an August 15, 2018 report, Dr. Donegan noted that appellant was seen for evaluation of her right shoulder. Appellant had related that the employing establishment would only allow her to work two hours a day, but she wanted to return to full-time work. Dr. Donegan examined appellant and placed her on work restrictions. He recommended sedentary work with no lifting or overhead work, desk work only. Dr. Donegan also recommended that appellant continue with physical therapy.

From September to December 2018 the employing establishment continued to offer, and appellant continued to accept, modified job offers with differing duties and work hours. On December 11, 2018 appellant accepted a modified-duty assignment as a part-time flexible sales and services associate, which entailed working 25 hours per week. The duties of the position included window duties with assistance, mail distribution with the left hand, boxing P.O. Box mail with the left hand, and light cleaning (*i.e.*, dusting and sweeping). The physical requirements of the position were noted as requiring use of left hand or arm.

On January 23, 2019 Dr. Donegan reported that appellant was seen for reevaluation of her right shoulder. He noted that appellant had a failed superior capsular reconstruction and that she had continued pain, but she continued to work. Dr. Donegan related that appellant's only option would be to undergo a reverse arthroplasty, but that appellant was not compelled to undergo this procedure at this point.

In a February 13, 2019 report, Dr. Donegan noted that appellant had called him regarding the issue with her shoulder. He related that she requested approval for a reverse arthroplasty, noting that she had a failed capsular reconstruction. Dr. Donegan noted that appellant had a rotator cuff tear caused by a work-related injury. He explained that appellant had no options for further treatment, her range of motion was severely limited to only 90 to 100 degrees, and she had marked weakness throughout cuff testing. Dr. Donegan noted that she had failed superior capsular reconstruction and her only option was a reverse arthroplasty, given her limitation in motion and her structural changes. He opined that, given her significant pain and current limitations, it was reasonable to hold appellant off work, as she was unable to reach, push, pull, and lift. Dr. Donegan noted that even waist-level activities could be difficult for her.

Appellant stopped work on February 15, 2019.

On March 4, 2019 appellant filed a notice of recurrence (Form CA-2a), alleging that she sustained a recurrence of disability on February 15, 2019.

In a development letter dated March 11, 2019, OWCP provided a definition of a recurrence of disability. It advised appellant of the type of factual and medical evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

On March 20, 2019 OWCP referred appellant to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion examination to determine the relationship between her claimed conditions and the accepted January 24, 2017 employment injury. OWCP asked the doctor to address a number of questions, including: whether the employment-related condition had resolved; and whether appellant was capable of resuming the postal clerk position, and if not, whether appellant was capable of performing light-duty work.

In an April 9, 2019 report, Dr. Nadar noted appellant's history of injury and treatment and the accepted condition of full thickness rotator cuff tear, right shoulder. He opined that the accepted condition had not resolved, as the surgery was not successful, and appellant continued to have residual pain, weakness, and difficulties with overhead activities. Dr. Nadar explained that a recent magnetic resonance imaging (MRI) scan confirmed a failure of surgical rotator cuff repair and that appellant had reached maximum medical improvement. In response to whether appellant could perform the duties of a postal clerk, he replied in the negative and explained that appellant could perform only sedentary work, eight hours per day, with modifications. Regarding a reverse shoulder replacement, Dr. Nadar indicated that it was medically necessary, as the surgical repair of the rotator cuff failed, and "[h]opefully that can be performed at a later time." He recommended continued home exercises and strengthening, pain management, and a reverse shoulder arthroplasty after age 65.

On April 11, 2019 OWCP received appellant's response to its development letter. Appellant indicated that she "never stopped hurting." She related that she continued with consistent symptoms and had to resort to taking pain medications while working. Appellant also noted that her prior superior capsule restriction was not successful.

OWCP received hospital records from Dr. Donegan with a May 1, 2019 admittance date and a May 31, 2019 discharge date. Dr. Donegan diagnosed cervicalgia, pain in the right shoulder, and strain of muscles and tendons of the rotator cuff of the right shoulder, sequela.

OWCP authorized right reconstruction of the shoulder joint on May 28, 2019.

By decision dated June 3, 2019, OWCP found that the medical evidence of record was insufficient to establish an employment-related recurrence of disability, commencing February 15, 2019, causally related to the accepted January 24, 2017 employment injury.

On June 10, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 27, 2019.

OWCP received a June 11, 2019 report, wherein Dr. Donegan noted that he had reviewed Dr. Nadar's report and concurred with part of his report. He agreed that appellant was capable of sedentary work and indicated that "she can do desktop level work as her range of motion is severely limited to anything up over chest over shoulder height." Dr. Donegan disagreed with Dr. Nadar regarding the type of surgery appellant had. He indicated that appellant did not have a rotator cuff repair and explained that a superior capsular reconstruction was a reconstructive surgery using a dermal patch. Dr. Donegan noted that it was much more complex than a rotator cuff repair. He

explained that waiting until appellant was 65 or older for the reverse arthroplasty was problematic because she met the criteria for the surgery and was ready for the surgery prior to age 65.

In a July 25, 2019 operative report, Dr. Donegan noted that he performed a right reverse total shoulder arthroplasty.

OWCP resumed payment to appellant of wage-loss compensation on the supplemental rolls as of July 25, 2019.

OWCP continued to receive medical evidence including physical therapy notes from March 6, 2018 to April 16, 2019, and occupational therapy notes from July 26, 2019.

In an October 28, 2019 report, Dr. Donegan noted that x-rays revealed a well-positioned reverse total shoulder replacement. He completed a Form OWCP-5c on October 28, 2019, and noted that appellant could perform sedentary work with no use of the right upper extremity.

By decision dated November 18, 2019, OWCP's hearing representative affirmed the June 3, 2019 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

### **ANALYSIS**

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

In order to determine the relationship, if any, between appellant's claimed conditions and the accepted January 24, 2017 employment injury, OWCP referred appellant to its second opinion

---

<sup>5</sup> 20 C.F.R. § 10.5(x); *A.V.*, Docket No. 20-0486 (issued June 20, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>6</sup> See *D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *Id.*

physician, Dr. Nadar. It asked Dr. Nadar to determine whether the employment-related condition had resolved, whether appellant was capable of resuming her date-of-injury position as a postal clerk, and if not, whether appellant was capable of performing light-duty work. Dr. Nadar opined that appellant required total shoulder arthroplasty as her initial rotator cuff surgery had failed and she continued to experience residuals in the form of pain, weakness, and difficulties with overhead activities. He concluded that she was incapable of performing the duties of her date-of-injury position as a postal clerk and recommended sedentary duty for eight hours per day with restrictions. Dr. Nadar did not, however, specifically address whether appellant sustained a recurrence of disability causally related to the accepted employment injury as of February 15, 2019, as OWCP did not ask him to address that question.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>8</sup> While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.<sup>9</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>10</sup> Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>11</sup> As OWCP undertook development of the record by referring appellant to Dr. Nadar, it has the responsibility to procure a rationalized medical opinion on the issue of whether appellant sustained a recurrence of disability commencing February 15, 2019 causally related to the accepted January 24, 2017 employment injury.<sup>12</sup>

Thus, the Board will remand the case to OWCP to obtain a fully-rationalized medical opinion from Dr. Nadar as to whether appellant sustained a recurrence of disability on February 15, 2019 causally related to the accepted January 24, 2017 employment injury. If Dr. Nadar is unavailable or unwilling to render a supplemental opinion, then OWCP shall refer appellant, together with a SOAF and the medical records, to another second opinion physician in the appropriate field of medicine for a rationalized opinion on the issue to be resolved.<sup>13</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

---

<sup>8</sup> *L.B., id.*; *Vanessa Young*, 56 ECAB 575 (2004).

<sup>9</sup> *K.T.*, Docket No. 19-1436 (issued February 21, 2020); *D.G., id.*; *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>10</sup> 20 C.F.R. § 10.121; *see also K.S.*, Docket No. 18-0845 (issued October 26, 2018).

<sup>11</sup> *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *K.S., id.*

<sup>12</sup> *See A.A., id.*

<sup>13</sup> *See M.T.*, Docket No. 20-0321 (issued April 26, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 18, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 9, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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