

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

K.M., Appellant)	
)	
and)	Docket No. 21-1262
)	Issued: July 15, 2022
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Las Vegas, NV, Employer)	
)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 19, 2021 appellant, through counsel, filed a timely appeal from a July 27, 2021 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 an 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 27, 2021 decision, OWCP received additional evidence. 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 disability commencing November 14, 2020, causally related to the accepted September 5, 2018 employment injury.

FACTUAL HISTORY

On September 6, 2018 appellant, then a 30-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 5, 2018 she strained her left shoulder while lifting packages and carrying containers. OWCP accepted the claim for cervical, left shoulder, and upper arm strains; left rotator cuff tear; and left shoulder ankylosis. It authorized left shoulder arthroscopic rotator cuff debridement, which was performed on February 21, 2020. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 21 through August 14, 2020. On June 24, 2020 appellant returned to part-time modified work and claimed intermittent periods of disability.

On August 10, 2020 appellant underwent a functional capacity evaluation (FCE) to determine her work capacity. The FCE found that she was not capable of performing her date-of-injury job as a mail processing clerk. It identified lack of left upper extremity strength, range of motion (ROM), decreased endurance, and increased pain with all activities. The FCE noted that appellant demonstrated the ability to occasionally lift up to 25 pounds from floor to waist, 15 pounds from waist to shoulder, carry up to 20 pounds, push up to 39 pounds, and pull up to 49 pounds. In summary, it found that she was capable of performing medium work.

In an August 18, 2020 progress report, Dr. Firooz Mashhood, a Board-certified physiatrist, diagnosed status post cervical spine strain/sprain with complaints of increasing pain without radiculopathy, status post left shoulder sprain, and left shoulder partial rotator cuff tear. He released appellant to return to work with the restrictions found in the August 10, 2020 FCE. Dr. Mashhood advised that her condition was permanent and stationary.

On September 15, 2020 appellant accepted a modified clerk position. The duties of the position included up to four hours of pitching waste mail, up to eight hours of manual letters, up to four hours of bin 2 runner, and up to two hours of manual flats. With respect to physical requirements, it required up to eight hours of use of the right arm/hand, simple grasping, and lifting less than 25 pounds.

On September 28, 2020 appellant was seen in the emergency room by Dr. Hijazi Bilal, a Board-certified family medicine physician, for left shoulder pain and numbness. Appellant reported the onset of pain after lifting her son at home when she felt her shoulder pop. She also related her history of left shoulder rotator cuff surgery in January 2020. Dr. Bilal diagnosed sprain, rotator cuff injury, strain, shoulder separation, and arthritis.

A November 14, 2020 emergency room report related that appellant was seen by Nicholas Caruso, nurse practitioner, and Dr. Mishra Vikash, a Board-certified emergency medicine physician for complaints of bilateral shoulder pain, which she thought was also the cause of appellant's headache. Appellant's diagnoses were listed as headache, chronic shoulder pain, shoulder pain/swelling, and bilateral shoulder pain.

In a progress report dated November 18, 2020, Dr. Mashhood noted that appellant was discharged from his care on August 18, 2020 when he released her to return to work with restrictions. Appellant was seen again for complaints of increased left shoulder and neck pain as well as bilateral eye and head pain. On examination Dr. Mashhood reported that her left shoulder revealed tenderness, 50 percent ROM limitation, and 4/5 muscle strength. He diagnosed status post cervical spine strain/sprain with complaints of increasing pain without radiculopathy, status post left shoulder sprain, and left shoulder partial rotator cuff tear. Dr. Mashhood ordered a magnetic resonance imaging (MRI) scan of the right shoulder and cervical spine and placed appellant off work due to temporary disability.

On November 27, 2020 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability from work for the period November 14 to 20, 2020.

Dr. Mashhood, in a December 1, 2020 progress report, diagnosed status post cervical spine strain/sprain with complaints of increasing pain without radiculopathy, status post left shoulder sprain, and left shoulder partial rotator cuff tear. On physical examination, he reported left scapular muscle tenderness, 80 degrees flexion and abduction, 45 degrees internal and external rotation, cervical paraspinal muscle tenderness, 4/5 left upper extremity strength, and symmetrical reflexes. Dr. Mashhood placed appellant off work as he found her temporarily disabled.

Appellant filed CA-7 forms claiming wage-loss compensation for the period November 21, 2020 to January 1, 2021.

By decision dated January 22, 2021, OWCP denied appellant's claim for wage-loss compensation for disability commencing November 14, 2020. It found that the record did not contain a rationalized medical report explaining how her inability to perform her modified job was due to her accepted employment injury.

Following the denial of her claim, OWCP continued to receive evidence.

A September 28, 2020 x-ray interpretation of appellant's left shoulder reported no displaced bony fracture, erosion, periosteal reaction, or evidence of subluxation or dislocation.

On October 1, 2020 appellant was seen in the emergency room by Dr. Mishra, who diagnosed unspecified left upper limb mononeuropathy.

In duty status reports (Form CA-17) dated November 18 and December 1, 2020, and January 12 and 27, 2021, Dr. Mashhood noted an injury date of September 5, 2018, and advised that appellant was disabled from work.

In progress reports dated December 22, 2020 and January 12, 2021, Dr. Mashhood provided examination findings and placed appellant off work. A review of a December 17, 2020 cervical MRI scan showed Chiari 1 malformation. Physical examination findings and diagnoses were unchanged from prior reports.

A January 19, 2021 left shoulder MRI scan demonstrated mild-to-moderate tearing of the supraspinatus and infraspinatus with moderate-to-severe supraspinatus tendinosis, suggestion of remote labral injury at the biceps labral anchor, and distal clavicular osteolysis. A cervical MRI scan of even date demonstrated Chiari malformation.

Dr. Mashhood, in a January 27, 2021 progress report, noted that appellant complained of neck and left shoulder pain, loss of left arm sensation, and radicular arm pain. On physical examination he reported tender with superficial palpation of cervical paraspinal and left scapular muscles, 10 degrees cervical ROM in any direction, entire left upper extremity cogwheel weakness with 4/5 strength, and no hyperlexia. Dr. Mashhood diagnosed status post cervical spine strain/sprain with MRI scan study showing Chiari malformation, status post left shoulder strain/sprain with MRI scan study showing partial rotator cuff tear, and repeat MRI scan left shoulder study showed evidence of partial rotator cuff tear. He advised that appellant should remain off work.

On February 2, 2021 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on May 11, 2021

On February 2, 2021 appellant filed CA-7 forms claiming wage-loss compensation for the period January 2 to February 26, 2021.

In a Form CA-17 dated February 24, 2021, Dr. Mashhood related that appellant was capable of working four hours per day with restrictions including lifting up to 20 pounds.

In progress notes dated February 24 and March 25, 2021, Dr. Mashhood noted that appellant was working part time. He reported that her pain complaints, examination findings, and diagnoses remained unchanged.

On March 16, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and list of questions, to Dr. Michael T. Monroe, a Board-certified orthopedic surgeon, for a second opinion evaluation for an assessment of the extent of her work injury, work capacity, and treatment recommendations.

On March 24, 2021 appellant was seen in the emergency room by Dr. Shook-Ming Taylor, an osteopath Board-certified in emergency medicine, for left arm numbness. Dr. Taylor diagnosed chronic left shoulder and left upper extremity mononeuropathy.

In a report dated April 29, 2021, Dr. Monroe, based on a review of the medical record, SOAF, list of questions, and appellant's physical examination, diagnosed cervical strain with radiculopathy, left shoulder strain, status post left shoulder arthroscopic rotator cuff repair, and status post left shoulder arthrofibrosis. He opined that the accepted conditions had not resolved. With respect to disability as of November 16, 2020, Dr. Monroe indicated that appellant was capable of working the modified clerk job. In response to question of whether total disability as of November 16, 2020 was due to her accepted conditions, he responded that it related to her work-related conditions as no nonwork conditions were noted. In response to another question on appellant's disability status, Dr. Monroe indicated that she was capable of work below shoulder level without overhead reaching, which he noted that was described in the modified clerk position and FCE. He opined that she capable of working her clerk job full time, based on the FCE and physical examination findings. In an attached work capacity evaluation (Form OWCP-5c) of even date, Dr. Monroe indicated that appellant was capable of working an eight-hour day with restrictions, which included no reaching above the shoulder, pushing, pulling, or lifting.

Appellant subsequently filed a Form CA-7 claiming wage-loss compensation for the period February 27 to June 4, 2021.

In a supplemental report dated July 17, 2021, Dr. Monroe noted that, while the FCE indicated that appellant could perform medium strength work, he found that she could not perform any overhead activity due to her shoulder arthrofibrosis with pain and ROM limitation. As his restrictions conflicted with the FCE, he recommended a more current FCE to clarify her current work restrictions. Dr. Monroe noted that the therapist performing the FCE should be given a complete job description on which to base appellant's work restrictions.

By decision dated July 27, 2021, OWCP's hearing representative affirmed the January 22, 2021 decision, as modified to reflect that appellant had alleged a recurrence of disability due to her work stoppage on November 16, 2020. She determined that the medical evidence of record was insufficient to establish a recurrence of disability due to appellant's accepted left shoulder conditions.

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 that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the 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 his or her established physical limitations.⁵

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.⁶ As part of this burden of proof, the employee must show either 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

An employee who claims a recurrence of disability from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden of proof 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, for each period of disability claimed, the disabling condition is causally related to the employment injury and

⁴ 20 C.F.R. § 10.5(x); *see C.L.*, Docket No. 20-1361 (issued December 8, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁵ *Id.*

⁶ *C.L., id.*; *R.M.*, Docket No. 20-0486 (issued June 9, 2021); *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).

⁷ *C.L., id.*; *A.H.*, Docket No. 20-1211 (issued April 30, 2021).

supports that conclusion with medical reasoning.⁸ Where no such rationale is present, the medical evidence is of diminished probative value.⁹

ANALYSIS

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

On March 15, 2021 OWCP referred appellant to Dr. Monroe for a second opinion evaluation regarding the extent of her work injury, her work capacity, and medical treatment recommendations. In his April 29, 2021 report, Dr. Monroe noted his review of the SOAF, the modified clerk job offer, and appellant's medical record including an August 10, 2020 FCE. He provided examination findings and diagnosed cervical strain with radiculopathy, left shoulder strain, status post left shoulder arthroscopic rotator cuff repair, and status post left shoulder arthrofibrosis. Dr. Monroe opined that the accepted conditions had not resolved, but that appellant was capable of working with restrictions, which included no reaching above the shoulder, pushing, pulling, or lifting.

In a supplemental report dated July 17, 2021, Dr. Monroe recommended a current FCE to clarify her work restrictions. In support of this request, he explained that the August 10, 2020 FCE indicated that appellant could perform medium strength work while his examination findings found that she could not perform overhead activity. Dr. Monroe specifically recommended that the individual performing the FCE be given a copy of appellant's modified position description, from which her work restrictions could be determined.

The Board notes, in this regard, the job offer appellant accepted on September 15, 2020 required lifting less than 25 pounds, while the FCE found that she could occasionally lift up to 25 pounds from floor to waist, 15 pounds from waist to shoulder, and Dr. Monroe related that she could not perform any overhead work activity.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁰

Dr. Monroe clarified his opinion as to whether appellant was capable of working her modified job as of November 16, 2020. He specifically found that she could not perform any overhead work activity. Dr. Monroe, serving as OWCP's second opinion examiner, noted that appellant's work restrictions seemingly conflicted with the FCE and the modified job offer. He recommended a current FCE to clarify her current work restrictions. The case must therefore be remanded to OWCP to obtain a current FCE to clarify appellant's work capacity. OWCP must also clarify Dr. Monroe's opinion to determine whether appellant was disabled from performing her

⁸ *C.L., id.; H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁹ *C.L., id.; E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹⁰ *W.H.*, Docket No. 21-0139 (issued October 26, 2021); *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

modified job on and after November 16, 2020 due to her accepted September 5, 2018 employment injury.¹¹

On remand, OWCP shall refer appellant for another FCE to clarify her work capacity. After an updated FCE has been conducted, it shall request a supplemental report from Dr. Monroe to determine whether or not she sustained a recurrence of disability on and after November 14, 2020, causally related to the accepted September 5, 2018 employment injury. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 15, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *W.H., id.; M.T., id.*